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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1950

No. 297

KIEFER-STEWART COMPANY, PETITIONER,

vs.

**JOSEPH E. SEAGRAM & SONS, INC., SEAGRAM-
DISTILLERS CORPORATION, THE CALVERT DIS-
TILLING COMPANY, ET AL.**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

PETITION FOR CERTIORARI FILED SEPTEMBER 9, 1950.

CERTIORARI GRANTED OCTOBER 23, 1950.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1950.

No.

KIEFER-STEWART COMPANY,

Petitioners,

vs.

JOSEPH E. SEAGRAM & SONS, INC., SEAGRAM-DISTILLERS CORPORATION, THE CALVERT DISTILLING COMPANY AND CALVERT DISTILLERS CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT.

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TRANSCRIPT OF RECORD FILED AUGUST 31, 1949
PRINTED RECORD

In the
United States Court of Appeals
For the Seventh Circuit

No. 10001

KIEFER-STEWART COMPANY,
Plaintiff-Appellee,

vs.

**JOSEPH E. SEAGRAM & SONS, INC., SEAGRAM-
DISTILLERS CORPORATION, THE CALVERT DIS-
TILLING COMPANY AND CALVERT DISTILLERS
CORPORATION,**

Defendants-Appellants.

**Appeal from the United States District Court for the
Southern District of Indiana, Indianapolis Division.**

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1 . Pleas of the United States District Court for the Southern District of Indiana, at the United States Court House in the city of Indianapolis, in said District, before the Honorable Robert C. Baltzell, Judge of said District Court.

Kiefer-Stewart Company,
vs.

Joseph E. Seagram & Sons, Inc.,
Seagram-Distillers Corporation,
The Calvert Distilling Co., and
Calvert Distillers Corporation. } No. 1524 Civil

Be it remembered that heretofore towit: at the May Term of said Court, on the 13th day of September, 1947, before the Honorable Robert C. Baltzell, Judge of said Court, the following proceedings in the above entitled cause were had, towit:

Comes now the plaintiff by its attorneys and files complaint in the above entitled cause, which complaint is as follows:

2 IN THE DISTRICT COURT OF THE UNITED STATES.

For the Southern District of Indiana,

Indianapolis Division.

Kiefer-Stewart Company,
Plaintiff,

vs.

Joseph E. Seagram & Sons, Inc.,
Seagram-Distillers Corporation,
The Calvert Distilling Co., and
Calvert Distillers Corporation,
Defendants.

Civil Action,
No. 1524.

BILL OF COMPLAINT.

(Filed Sept. 13, 1947. Albert C. Sogemeier, Clerk.)

The plaintiff, Kiefer-Stewart Company, complains of Joseph E. Seagram & Sons, Inc., Seagram-Distillers Corporation, The Calvert Distilling Co., and Calvert Distillers Corporation, corporations, and each of them, and for its cause of action alleges that:

1. Plaintiff, Kiefer-Stewart Company (hereinafter referred to as "Kiefer-Stewart") is a corporation organized and existing under and by virtue of the laws of the State of Indiana, with its principal office and place of business in the City of Indianapolis, Marion County, Indiana, and is a citizen and resident of the Southern District of Indiana.

2. Defendant Joseph E. Seagram & Sons, Inc. (hereinafter sometimes referred to as "Seagram (Indiana)") is a corporation organized and existing under the laws of the State of Indiana, with its principal executive offices in the City of New York, New York, which is engaged in the distillation, rectification and sale of whisky and other liquors.

3. Defendant Seagram-Distillers Corporation (hereinafter referred to as "Seagram (Sales)") is a corporation organized and existing under the laws of the State of Delaware, and is a wholly-owned sales subsidiary of said Joseph E. Seagram & Sons, Inc., engaged in the sale of whisky and other liquors.

4. Defendant The Calvert Distilling Co. (hereinafter sometimes referred to as "Calvert"), is a corporation organized and existing under the laws of the State of Maryland, with its principal office in New York, New York, which is also engaged in the distillation, rectification and sale of whisky and other liquors.

5. Defendant Calvert Distillers Corporation (hereinafter sometimes referred to as "Calvert (Sales)"), a wholly-owned sales subsidiary of defendant Calvert Distilling Co., is a Maryland corporation which is engaged in the sale of whisky and other liquors.

6. At all times mentioned in this complaint the defendants Seagram (Indiana), Seagram (Sales), Calvert and Calvert (Sales) have engaged in trade and commerce in the sale and distribution of whisky and other liquors throughout the United States of America and in the Southern District of Indiana, and have transacted business in the Southern District of Indiana, all as hereinafter more particularly alleged.

7. This action is brought, and the jurisdiction of this Court is invoked, under Section 15, Title 15, of the United States Code, which provides that any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor, without respect to the amount in controversy, in any District Court of the United States in the district in which the defendant resides or is found or has an agent, or, as provided in 4 the case of corporations by Section 22 of said Title 15, in the district of which it is an inhabitant, or in which it may be found or transacts business.

8. Defendant Joseph E. Seagram & Sons, Inc. (Seagram (Indiana)) was organized on October 23, 1933, under the laws of the State of Indiana as a wholly-owned subsidiary of Distillers Corporation-Seagram, Ltd., of Montreal, Canada, a Canadian corporation (sometimes hereinafter referred to as "Distillers-Seagram"). In December, 1933, said defendant Seagram (Indiana) acquired distilleries at Lawrenceburg, Indiana, and from the date of such acquisition until the date hereof, said defendant Seagram (Indiana) has engaged in the operation of said distilleries at Lawrenceburg, Indiana, and of other distilleries, from time to time built or acquired by it throughout the United States. At all times alleged herein defendants Seagram (Indiana) and Seagram (Sales) have sold whiskies and other liquors, distilled or rectified by Seagram (Indiana),

throughout the United States, including the State of Indiana, and at all such times have imported whisky in case lots from the Dominion of Canada into Indiana for reshipment to other states or for sale and delivery in its original packages in the State of Indiana.

9. Distillers-Seagram, said Canadian corporation, was organized under the laws of Canada on March 2, 1924. Until the acquisition by the defendant Seagram (Indiana) from Distillers-Seagram of the outstanding securities of all of the United States subsidiaries of said Canadian corporation on April 9, 1945, as hereinafter alleged, said Distillers-Seagram, through the ownership of such securities, was one of the largest distillers and distributors of whisky and other distilled spirits in the United States and approximately 95% of all of its business in whisky and other distilled spirits was transacted in the United States.

Said Canadian corporation was until April 9, 1945, 5 and Seagram (Indiana) since said date of April 9, 1945, has been one of the so-called "Big Four" distilling companies of the United States, consisting of Distillers-Seagram or Seagram (Indiana), as aforesaid, National Distillers Products Corporation, Schenley Distillers Corporation and Hiram Walker, Gooderham & Worts, Ltd. Said "Big Four" distilling companies since the repeal of prohibition have sold, either directly or through their subsidiary or affiliated companies, from 80% to 90% of all the whisky and other distilled spirits sold in the United States. During the year 1946, Schenley Distillers Corporation sold approximately \$643,000,000 of such products, Seagram (Indiana) approximately \$500,000,000, National Distillers Products Corporation approximately \$400,000,000, and Hiram Walker over \$225,000,000. Distillers in the liquor industry not affiliated with the "Big Four" are known as independents.

Said "Big Four" distilling companies, including affiliated companies, distill or rectify and sell substantially all of the leading popular brand whiskies. Seagram's line of whiskies include, among others, Seagram's V-O, a Canadian import, Seagram's 7-Crown, Seagram's 5-Crown and Kessler, said brands being the principal Seagram brands sold in the State of Indiana.

10. Whisky is made from grain by a fermentation and distillation process. Bourbon whiskey is made from a mash containing 51% or more of corn grain, and rye whisky from a mash containing 51% or more of rye grain. Most

bourbon mash also contains rye and malted barley, and most rye mash contains corn and malted barley. The grain ingredients of whisky first are ground to a meal and cooked with malt and water, in which process the malt converts the grain starches into dextrose, a fermentable sugar.

6 The next step is the fermentation process in which yeast, the fermenting agent, activates the change of the grain sugars into alcohol, and in which step carbon dioxide and other gases are eliminated. In the final or distillation process, the alcohol obtained by the fermentation process is vaporized by heating, and after passing through long coils (known as "stills") is condensed into a liquid which is new whisky. This liquid is colorless and without flavor or character until aged. The aging process consists of the storage of the whisky after distillation, but before bottling, in charred new oak barrels. In the aging process a reaction between the whisky and the constituents in the wood give the whisky its characteristic color and flavor. American whisky is aged on the average four years, with a minimum of two years and maximum of eight years, the latter being the maximum time in which whisky can be aged in Government bonded warehouses without payment of Federal excise taxes.

Whiskies in general are classified as "straight whiskies", "blended whiskies" and "spirit blends". "Straight whiskies" are those which have been aged for at least two years and are at least 80 proof (or 40% of alcohol by volume). "Bottled in bond" whiskies are straight whiskies which are aged for at least four years, are 100 proof and are bottled and warehoused under Federal regulations by which payment of the excise tax is deferred until such whiskies are put in consumption channels. "Blended whiskies" are a blend of two or more straight whiskies. "Spirit blend" whiskies consist of a blend of straight whisky, which under Federal regulations must constitute at least 20% by volume thereof, with "neutral spirits" distilled either from grain or other alcohol-producing raw material, as to which spirits there is no aging requirement.

11. Until the advent of World War II, straight and bottled-in-bond whiskies predominated in the with-
7 draws made of whisky supplies by distillers and rectifiers for distribution and sale in the United States. In 1940, straight and bottled-in-bond whiskies constituted approximately 62% of whisky stocks put into consumption channels as compared to 38% of spirit blend whiskies; in

1941 approximately 57% compared to 43% of spirit blend whiskies; and in 1942, approximately 52% compared to 48%.

Of said "Big Four" distilling companies, Distillers-Seagram was the only major distiller, prior to World War II, which produced and distributed in great quantities, high quality, popular-priced spirit blend whiskies, composed, as aforesaid, of a mixture of straight whisky and distilled neutral spirits. During said years 1940 to 1942, both inclusive, Distillers-Seagram and its affiliated corporations sold approximately 80% of the spirit blend whiskies sold in the United States, while the other Big Four companies specialized largely in straight and bonded whiskies. As a result of its pre-war specialization in the production of spirit blends, Distillers-Seagram and its affiliated corporations, and Seagram (Indiana) since 1945, at all times since the advent of World War II to the date hereof have continued as the leaders in the spirit blend field and have had an advantage over other distillers in having on the market established brands of spirit blend whiskies, which are essential to the stocks of large wholesale distributors; such as plaintiff, as hereinafter alleged.

12. On October 8, 1942, as a result of World War II and of the extraordinary need for grain supplies in the prosecution of the war, the distillation of grain into whisky was ordered discontinued by the Government of the United States and except for one month holidays in the months of August, 1944, and January and July, 1945, no whiskies were permitted to be distilled from grain from said date of October 8, 1942, until November, 1945. Continued but

modified restrictions upon grain use for beverage spirits were thereafter continued through the year 1946, due to world demands for food and feed. As a result, all whisky distillers, including those who had been largely straight whisky producers, were required to stretch their inventories of straight whiskies on hand in 1942 over the period of the war, and until distillation restrictions were removed and until further stocks of whisky could be distilled and aged.

Accordingly, beginning in October 1942, all distillers in order to stretch their stocks of straight and bonded whiskies, and because of Governmental control of prices, as hereinafter alleged, began increasingly to blend such stocks with neutral spirits and to sell increasingly large proportions of spirit blends. In 1943, spirit blend with-

drawals constituted approximately 60% of the whisky put into consumption channels compared to approximately 40% for straight and bonded whiskies, in 1944, approximately 75% compared to approximately 25%, in 1945, approximately 86.5% compared to 23.5%, and in 1946 approximately 89.6% compared to 10.4%.

13. Shortly after the distillation of whisky from grains was ordered discontinued on October 8, 1942, all whisky distillers in the United States, including the defendants, as a further means of conserving their liquor stocks, adopted an allocation system for the distribution of their supplies of whiskies, under which system wholesale distributors of whisky were drastically cut in their normal whisky purchases.

14. Although whisky production was partially resumed late in 1945, since it requires approximately four years properly to age whisky, the whisky distilled since the resumption of distilling operations has been required to be laid away for aging and has not added materially to available whisky inventories, and normal stocks of straight whiskies will not be available until 1949 or 1950.

9 Therefore, the allocation system adopted by the distillers at the beginning of the war was continued after the resumption of distillation and to the date hereof, and spirit blend whiskies at all times since October 8, 1942, have constituted, now constitute and for several years in the future will constitute, the major type of whisky available for distribution in the United States.

15. Plaintiff at all of the times herein alleged is and was a wholesale drug company, one of whose principal lines of business is the purchase both within and outside the State of Indiana of high grade whisky and other liquors and the sale thereof, at wholesale, in the State of Indiana: Prior to 1942, plaintiff sold at wholesale in the State of Indiana, more than 13,000 cases of whisky per month. Of such amount, approximately 4,000 cases per month were supplied to it by the then United States subsidiaries of Distillers-Seagram, chiefly, Seagram (Indiana), Seagram (Sales) and Julius Kessler Distilling Co., Inc., an Indiana corporation which leased the Lawrenceburg distilleries of Seagram (Indiana) for the manufacture of whiskies sold under the Kessler name. Approximately 4,000 cases per month then were purchased by plaintiff from Schenley, approximately 2,000 cases from National and the balance from smaller distillers.

16. Plaintiff began handling the Seagram whisky line through Seagram (Indiana) and Seagram (Sales) shortly after the repeal of prohibition in the year 1933, and plaintiff from said date until November, 1946, built up through sales effort, promotion and service, a large demand in the State of Indiana for Seagram products, especially its line of spirit blend whiskies. Prior to the advent of the war Seagram (Indiana) and Seagram (Sales) supplied plaintiff with practically all of the spirit blend whiskies sold by plaintiff and until November, 1946, plaintiff was one of the largest distributors of Seagram whiskies in Indiana.

17. Defendant Calvert Distilling Company was organized under the laws of Maryland in 1933. Said corporation operates distilleries, rectifying plants and warehouses in the States of Kentucky and Maryland and maintains executive offices in Louisville, Kentucky, and New York, New York. Soon after its organization it acquired the "Calvert" trademark under which, in former years, other companies, largely in the South and East had sold whisky on a comparatively small scale. Early in 1934, Distillers-Seagram acquired full stock control of the Calvert Distilling Company. Calvert thereafter greatly expanded its operations until, in 1942, Calvert and Seagram (Indiana) were the largest distillers and distributors of spirit blend whiskies in the United States. Calvert's principal brands under which its whiskies are sold are Lord Calvert, Calvert Reserve and Calvert Special.

18. Although, between the period from 1934 to April, 1945, both Seagram (Indiana) and Calvert were subsidiaries of Distillers-Seagram (the Canadian corporation), they were separately managed, maintained separate sales organizations and were in full and active competition in the sale of their products throughout the United States. Calvert's products during said period were, and are, largely sold through its said sales subsidiary, defendant Calvert (Sales), and Seagram (Indiana's) products were and are largely sold through its said sales subsidiary, Seagram (Sales).

19. For many years prior to April 9, 1945, Seagram (Indiana) and Calvert were the largest operating subsidiaries in the United States of Distillers-Seagram, the Canadian corporation. Both of said defendants operated,

independently each of the other, numerous distilleries, rectifying plants and warehouses and marketed their products independently and in competition each with the other throughout the United States. From the years 1938 to 1942, said defendants paid to Distillers-Seagram, the Canadian corporation, in the form of dividends on their capital stock the following amounts:

	1942	1941	1940	1939	1938
Seagram (Indiana)...	\$ 900,000	920,680	1,108,000	936,000	2,575,000
Calvert	1,200,000	914,241	2,500,000	1,250,000	3,725,000

20. On April 9, 1945, at a time when Seagram (Indiana) and Calvert were two of the largest distillers, rectifiers and distributors of spirit blend whiskies in the United States, and when they were in active and substantial competition each with the other, Seagram (Indiana) acquired from Distillers-Seagram, the Canadian corporation, all of the common stock and other outstanding securities of Calvert. Calvert, at the time, had outstanding, in addition to its common stock, \$6,550,000 of its 6 percent debentures due November 11, 1946, and 33,000 shares, having a par value of \$100 per share of its non-cumulative 6 percent preferred stock (or a total par value of \$3,300,000). Seagram (Indiana) in exchange therefor issued to Distillers-Seagram 98,500 shares of its 6 percent non-cumulative preferred stock, having a par value of \$100 per share (or a total par value of \$9,850,000). In addition, Seagram (Indiana) issued to Distillers-Seagram 1,250 shares of its common stock in exchange for all of the outstanding shares of common stock of defendant Calvert, Distillers Warehouses, Inc. and Seagram, Inc. (Kentucky), then owned by Distillers-Seagram, the Canadian corporation. As a result of said acquisition, Seagram (Indiana) acquired control of all of the United States subsidiaries of Distillers-Seagram and specifically of Calvert, one of its principal competitors, the effect of which acquisition was to lessen competition between Seagram (Indiana) and Calvert, and to restrain interstate trade and commerce, in violation of Section 18 of Title 15 of the United States Code, also known as Section 7 of the Clayton Act (Act approved October 15, 1914, C 323, 38 Stat. 731).

21. At no time since 1934 has defendant Calvert had adequate distribution facilities in the State of Indiana for the marketing of its whiskies, and at all times since 1934

defendant Calvert has been attempting to increase the sale of its products in the State of Indiana. Soon after the repeal of prohibition laws, and in 1934, defendant Seagram (Indiana) and Seagram (Sales) obtained the marketing facilities of approximately twelve of the largest wholesale distributors in the State of Indiana, including plaintiff.

In 1942, defendant Calvert initiated negotiations with plaintiff, Kiefer-Stewart, with reference to the handling by the latter, as a wholesale distributor, of the Calvert line of whiskies in the State of Indiana, in order that Calvert might have adequate distribution facilities for its products within such state, and from that time until November, 1946, Calvert repeatedly sought to obtain plaintiff's services as a distributor of Calvert's said products. Defendants Seagram (Indiana) and Seagram (Sales) during such entire period sought to prevent plaintiff from handling Calvert whiskies, and repeatedly threatened plaintiff with the deprivation of its Seagram distributorship in the event plaintiff took on the Calvert line. Calvert from time to time from 1942 until November, 1946, negotiated with plaintiff as to the handling by plaintiff of Calvert's products but until said latter time, Calvert was unable to promise to supply plaintiff with a sufficient amount of its whiskey to warrant plaintiff's handling such line.

22. That prior to the wartime price restrictions placed upon the resale prices of whiskey to be charged by wholesalers, plaintiff and other wholesalers in the State of
13 Indiana customarily resold whiskies purchased by them at the f.o.b. price at the distillers plant, plus freight, excise taxes and a customary mark-up of 17½ percent, which mark-up yielded plaintiff a gross profit of approximately 15 percent on the selling price thereof. On August 11, 1943, the Office of Price Administration promulgated Maximum Price Regulation 445, under which wholesalers, including plaintiff, were permitted a mark-up on whiskies of 15 percent over cost, but were not permitted to include as an item of cost in determining their mark-up any increase in taxes which might be imposed by the Federal or State governments after November 2, 1942. Subsequent to the adoption of Maximum Price Regulation 445, an additional Federal tax of \$3 per proof gallon was added to the wholesalers' cost of whisky on April 1, 1944, and

an Indiana tax of \$1 per wine gallon was added on May 1, 1945. Inasmuch as such taxes paid were not permitted to be taken into account in fixing the 15 percent mark-up, it resulted that the gross profit allowed wholesalers, including plaintiff, amounted to approximately 10 percent on the selling price of such products, instead of approximately 15 percent before price regulation was imposed.

23. On October 23, 1946, government regulation of liquor prices, under the Office of Price Administration, was terminated, and soon thereafter plaintiff, on account of increased and increasing operating costs, decided to return to its historic policy, existing before price regulation, of determining the selling price of whisky purchased by it, on the basis of the f.o.b. price at the distiller's plant, plus freight, Indiana excise taxes, and a mark-up of 15 percent, which would yield the plaintiff a gross profit on the selling price of approximately 13 percent, as against the customary mark-up of 17½ percent which had been in effect prior to price regulation under the O.P.A., and which yielded, as aforesaid, a gross profit of 15 percent.

At or about the same time, defendants Seagram 14 (Indiana) and Seagram (Sales) notwithstanding the end of price control under the O.P.A., under which the wholesale and retail prices of its products were automatically fixed, attempted unlawfully to fix, at the former O.P.A. levels, the wholesale and retail prices of whiskies sold by them to plaintiff and other wholesalers. Said defendants Seagram (Indiana) and Seagram (Sales) at all times from and after the advent of World War II made, and continue to make, large and unreasonable profits in the sale of their products, and said defendant, if they deemed it desirable so to do, could have insured the continuance of the existing level of prices to the consumer by a reduction in the prices which they charged wholesalers for Seagram products. However, said defendants Seagram (Indiana) and Seagram (Sales) instead sought to maintain existing prices of Seagram products to the consumer in the State of Indiana by interference with the right of wholesalers to fix their own resale prices through unlawful agreements with Indiana wholesalers as to the resale prices which such wholesalers would charge for Seagram products purchased by them, and by unlawful combination and conspiracy with defendant Calvert and Calvert (Sales) to withhold whisky supplies from any

Indiana wholesaler who would not follow the directions of said defendants Seagram (Indiana) and Seagram (Sales) as to resale prices and by the exercise over defendant Calvert and Calvert (Sales) of the influence unlawfully acquired by defendant Seagram (Indiana) by reason of the aforesaid unlawful stock acquisition of April 9, 1945, all as more fully hereinafter alleged.

24. On or about November 7, 1946, defendants Calvert and Calvert (Sales), which had repeatedly theretofore besought plaintiff to handle the Calvert line of whiskies in the State of Indiana, offered to plaintiff, following negotiations in that regard initiated by said defendants, that if plaintiff would become one of their distributors defendants Calvert and Calvert (Sales) would be able in the future to allocate to plaintiff a continuing supply of from 2,000 to 3,000 cases of Calvert whiskies per month, which offer was accepted by plaintiff.

Under the custom and practice in vogue after October, 1942, with respect to the making of contracts by wholesalers with distillers for the purchase of specific shipments of whisky, distillers, including defendants Seagram (Indiana) and Calvert, directly or through their sales subsidiaries, notified wholesalers monthly in writing that an allocation of a certain number of cases of whisky or other liquors had been made to such wholesaler for such month, and a contract for the purchase thereof arose upon the delivery by the wholesaler to the distiller of the Indiana revenue stamps required for the amount of whisky or other liquors covered by such allocation, with shipment to follow receipt of such stamps. Pursuant to such custom and practice, plaintiff, after receipt of advice from Calvert through Calvert (Sales) of an initial allocation of 2,000 cases of whisky to it for the month of November, 1946, and of a further allocation of 2,000 cases of whisky for the month of December, sent to Calvert through Calvert (Sales) on or about November 13, 1946, and said defendants thereafter received, Indiana revenue stamps covering such two allotments. Plaintiff further supplied to Calvert through Calvert (Sales) Indiana revenue stamps to cover 2,000 cases of whisky for the months of January and February, 1947, pursuant to their said engagement to furnish a continuing supply of Calvert whisky of not less than 2,000 cases per month. None of said monthly allocations or orders of whisky were delivered to plaintiff by said de-

defendants Calvert or Calvert (Sales), however, as herein-after alleged.

25. On or about October 17, 1946, Seagram (Indiana) and Seagram (Sales) in keeping with their custom and 16 practice since the institution of their allocation system, as aforesaid, notified plaintiff in writing through the Seagram (Sales) executive offices in New York, N. Y., that there had been allocated plaintiff, 2,106 cases of Seagram whiskies for the month of November, 1948, and at said defendants' request and pursuant to said custom and practice, plaintiff, on or about October 28, 1946, delivered to defendant Seagram (Indiana) state revenue stamps covering such 2,106 cases, which cases were never delivered to plaintiff, however, as hereinafter alleged.

26. Immediately following the decision of plaintiff to apply its mark-up of 15% to all costs of whiskies sold by it, plaintiff filed, on or about November 1, 1946, but effective on November 6, 1946, a written price revision with the Alcoholic Beverage Commission of the State of Indiana showing such proposed change, which price change was approved by such Commission. Plaintiff is informed and believes, and upon such information and belief alleges, that all other Seagram distributors in the State of Indiana likewise filed price revisions showing a similar change in the application of their existing mark-ups. On or about said date of November 6, 1946, but after plaintiff's said change in its mark-up on whiskies had become effective, as aforesaid, defendants Seagram (Indiana) and Seagram (Sales) dispatched to plaintiff, and all of their other Indiana wholesale distributors, a telegram in the name of Seagram (Sales) reciting Seagram's aforesaid policy against any price increases by any Seagram wholesalers or retailers, and asking for an immediate report from each wholesaler as to the steps which the recipient was taking to cooperate in the carrying out of such policy. Plaintiff failed to make any response to said telegram, and, plaintiff is informed and believes, and upon such information and belief alleges, that all other Indiana Seagram distributors also failed to make any response to similar tele- 17 grams addressed to them by said defendants.

27. At or about the same time that defendants Seagram (Indiana) and Seagram (Sales) were advising Indiana whisky distributors of their aforesaid policy with respect to the maintenance of existing wholesale prices,

the sales organizations of defendants Calvert and Calvert (Sales) advised plaintiff that said Calvert companies did not intend to interfere with the resale prices charged by wholesalers for Calvert's products; that Calvert would continue to ship to the Indiana market, and that any alteration between said Seagram Companies and their Indiana wholesalers would afford said Calvert Companies an opportunity to increase substantially their Indiana market, of which opportunity they intended to take advantage. All Calvert whiskies at said time were distilled in the States of Kentucky or Maryland and were shipped therefrom, pursuant to allocations made in the State of Kentucky.

28. Shortly after said defendants Calvert and Calvert (Sales) had so notified plaintiff of their intention not to interfere with wholesale prices, including plaintiff's prices, and of their intention to ship Calvert products in interstate commerce to the plaintiff and other Calvert distributors, defendant Seagram (Indiana) and Seagram (Sales), subsequent to November 12, 1946, the exact time being known to said defendants but unknown to plaintiff, induced defendants Calvert and Calvert (Sales) to enter into an agreement, contract, combination and conspiracy unlawfully to agree upon and fix the resale prices of said defendants' respective whiskies sold to wholesalers in Indiana and unlawfully to cut off and cease all shipments of their respective whiskies both in interstate and intrastate commerce to such of the Indiana wholesalers as did not agree to abide by the resale prices so fixed and agreed upon by the said defendants.

Defendants Seagram (Indiana) and Seagram (Sales) were able to induce defendants Calvert and Calvert (Sales) to enter into such unlawful agreement, contract, combination and conspiracy concerning the resale prices to be charged by Indiana wholesalers for whiskies and to join defendant Seagram (Indiana) and Seagram (Sales) in imposing sanctions on "non-cooperating" wholesalers by refusing to ship Calvert whiskies in interstate commerce to such wholesalers, as a direct and proximate result of the unlawful acquisition by defendant Seagram (Indiana) of the common stock of Calvert on April 9, 1945. By reason of such unlawful stock acquisition, the independent management, sales organization and sales policy, which, as aforesaid, prompted Calvert and Calvert (Sales) to expand their Indiana market in competition with defendants Seagram

(Indiana) and Seagram (Sales) and to appoint plaintiff as a Calvert distributor and to contract and agree to supply Calvert products to plaintiff in competition with the products of Seagram (Indiana) and Seagram (Sales), became subject to the influence of the executive officers of Seagram (Indiana), who, by such acquisition had gained control over the Boards of Directors and over the outstanding securities of Calvert and Calvert (Sales).

29. Pursuant to said agreement, combination and conspiracy alleged in Paragraph 28 hereof, defendants Calvert and Calvert (Sales) and defendants Seagram (Indiana) and Seagram (Sales) suspended all shipments, both in interstate and intrastate commerce, of their whiskies to plaintiff and their other Indiana wholesalers from and after the time of their said agreement, combination and conspiracy and until February 3, 1947. Pursuant to said agreement, combination and conspiracy, defendants Seagram (Indiana) and Seagram (Sales) failed and refused to deliver to plaintiff the said allotment of 2,106 cases of whisky for the month of November, 1946, including 319 cases of Seagram's V-O, and imported Canadian 19 whisky, and defendants Calvert and Calvert (Sales)

failed and refused to deliver to plaintiff said 4,000 cases of Calvert whiskies allocated to plaintiff by defendants Calvert and Calvert (Sales) for the months of November and December, 1946. Said defendants continued to refuse to ship their whiskies to any Indiana wholesalers until all or substantially all of the Indiana distributors of Seagram and Calvert products, excepting the plaintiff, agreed with said defendants on or about February 3, 1947, on the resale prices which would be charged by such wholesalers for said products after the sale thereof by said defendants to said distributors.

30. Subsequent to said date of February 3, 1947, when said defendants, Seagram (Indiana), Seagram (Sales), Calvert and Calvert (Sales), resumed shipments to all other of their Indiana wholesalers, said defendants Calvert and Calvert (Sales) and defendants Seagram (Indiana) and Seagram (Sales), in order to punish plaintiff for having determined independently of said defendants the resale prices which it would charge for products purchased by plaintiff from said defendants, have continued to the date hereof to combine, conspire and agree to refuse to sell plaintiff both the Seagram and Calvert lines of whiskies.

31. As a result of said unlawful agreement, combina-

tion and conspiracy, interstate trade and commerce in the whiskies sold by said defendants Seagram (Indiana) and Seagram (Sales) and by defendants Calvert and Calvert (Sales) and competition between said Seagram companies and said Calvert companies with respect thereto, have been, and continue to be, limited and restrained.

32. As a proximate result of said combination, conspiracy and agreement between said defendants Seagram (Indiana), Seagram (Sales), and Calvert and Calvert (Sales) and of said unlawful acquisition by defendant Seagram (Indiana) of defendant Calvert's common stock
20 and other securities and of the influence unlawfully exercised by Seagram (Indiana) over defendants Calvert and Calvert (Sales) as a result of said acquisition, and as a proximate result of plaintiff's refusal to enter into any unlawful agreement with any of said defendants with respect to the resale prices to be charged by plaintiff for said defendants' whiskies, plaintiff has been deprived since November, 1946, of a continuing supply of the whiskies and other liquors sold by said defendants Seagram (Indiana), Seagram (Sales), Calvert and Calvert (Sales) and by reason thereof has suffered damage to its business in the sum of Three Hundred Twenty-five Thousand Dollars (\$325,000.00).

Wherefore, plaintiff prays judgment against said defendants for the sum of \$325,000.00, together with treble damages, such reasonable attorneys' fees as shall be fixed by the Court, the costs of this action and all other and further proper relief.

Baker & Daniels,

By Joseph J. Daniels (Signed)

William G. Davis (Signed)

John D. Cochran (Signed)

810 Fletcher Trust Bldg.
Indianapolis, Indiana.

Attorneys for Plaintiff.

21 And thereupon there was issued out of the office of the Clerk of this Court of writ of summons for the defendant, Joseph E. Seagram & Sons, Inc., to the United States Marshal Southern District of Indiana, and a writ of summons for the defendants, Seagram-Distillers Corporation, et al, to the United States Marshal, Southern District of New York.

22 And afterwards towit: at the May Term of said Court, on the 22nd day of May, 1948, before the Honorable Robert C. Baltzeit, Judge of said Court, the following further proceedings were had herein towit:

Come now the defendants Seagram Distilling Corporation and the Calvert Distilling Corporation by their attorneys and file answer, which answer is as follows:

23 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—1524) * *

ANSWER.

(Filed May 22, 1948. Albert C. Sogemeier, Clerk.)

First Defense

For first defense and answer to plaintiff's bill of complaint herein, the defendants above named (defendants Seagram Distillers Corporation and The Calvert Distilling Company not waiving their objection to the jurisdiction of their persons and venue of this action against them), hereinafter designating defendants separately by the names used in said complaint, admit or deny the allegations thereof as hereinafter stated:

1. Admit the allegations of paragraph (1).
2. Admit the allegations of paragraph (2).
3. Admit the allegations of paragraph 3.
4. Admit the allegations of paragraph 4.
5. Admit the allegations of paragraph 5.
6. Admit that Seagram (Indiana), Seagram (Sales), Calvert and Calvert (Sales) have engaged in trade in commerce in the sale and distribution of whiskey and other liquor in certain of the states of the United States of America; that Seagram (Indiana) has engaged in trade in commerce in the sale and distribution of whiskey and other liquor in the Southern District of Indiana; that Seagram (Indiana) and Calvert (Sales) have transacted business in the Southern District of Indiana. Except as so admitted, defendants deny each allegation contained in paragraph 6 of the complaint.
7. Deny knowledge or information sufficient to form a

belief as to each allegation contained in paragraph 7 of the complaint.

8. Admit that defendant, Joseph E. Seagram & Sons, Inc. (Seagram (Indiana)) was organized on October 23, 1933 under the laws of the State of Indiana as a wholly owned subsidiary of Distillers Corporation—Seagram, Ltd., of Montreal, Canada, a Canadian corporation (sometimes hereinafter referred to as “Distillers—Seagram”); that in December 1933, said defendant, Seagram (Indiana) acquired distilleries at Lawrenceburg, Indiana, and from the date of such acquisition until the date hereof said defendant, Seagram (Indiana) has engaged in the operation of said distilleries at Lawrenceburg, Indiana, and of other distilleries from time to time built or acquired by it in various states of the United States; that at all times alleged herein, defendant, Seagram (Indiana) and Seagram (Sales) have sold whiskeys and other liquors distilled or rectified by Seagram (Indiana), in certain states of the United States; that at all times alleged herein defendant, Seagram (Indiana), has sold whiskeys and other liquors distilled or rectified by it in the State of Indiana; and

25 that at all times alleged herein Seagram (Sales) has imported whiskey in case lots from the Dominion of Canada into Indiana for reshipment to other states or for sale and delivery, in its original packages, in the State of Indiana; except as so admitted, deny each allegation contained in paragraph 8 of the complaint.

9. Admit that Distillers—Seagram, was organized under the laws of Canada on March 2, 1928, and that Seagram's line of whiskeys include, among others, Seagram's V-O, a Canadian import, Seagram's 7-Crown, Seagram's 5-Crown and Kessler, said brands being the principal Seagram brands sold in the State of Indiana; except as so admitted, deny knowledge or information sufficient to form a belief as to each allegation contained in paragraph 9 of the complaint.

10. Admit the allegations of paragraph 10.

11. Deny, upon information and belief, that until the advent of World War II, straight and bottled-in-bond whiskeys predominated in the withdrawals made on whiskey supplies by distillers and rectifiers for distribution and sales in the United States and that in 1940 straight and bottled-in-bond whiskeys constituted approximately 62% of whiskey stocks put into consumption channels as compared to 38% of spirit blend whiskeys, in 1941 approxi-

mately 57% compared with 43% of blend whiskeys and in 1942 approximately 52% compared to 48%; except as so denied, deny each allegation contained in paragraph 11 of the complaint.

12. Deny, upon information and belief, so much of paragraph 12 as alleges that, beginning in October 1942; all distillers, in order to stretch their stocks of straight and bonded whiskeys, and because of governmental
26 control of prices, began increasingly to blend such stocks with neutral spirits and to sell increasingly large proportions of spirit blends, and that in 1943 spirit blends withdrawals constituted approximately 60% of the whiskey put into consumption channels compared to approximately 40% for straight and bonded whiskey, in 1944 approximately 75% compared to approximately 25%, in 1945 approximately 86.5% compared with 23.5%, and in 1946 approximately 98.6% compared to 10.4%; except as so denied, admit the allegations of paragraph 12 of the complaint.

13. Admit that shortly after the distillation of whiskey from grains was so ordered discontinued on October 8, 1942 these defendants adopted an allocation system for the distribution of their supplies of whiskeys; except as so admitted, deny each allegation contained in paragraph 13 of the complaint.

14. Admit that Calvert (Sales) continued its allocation system until March 1947 and admit that Seagram (Sales) has continued its allocation system to date; except as so admitted, deny knowledge or information sufficient to form a belief as to each allegation contained in paragraph 14 of the complaint.

15. Admit that now, and at all times alleged in the complaint, plaintiff is and was a wholesale drug company, one of whose principal lines of business is the purchase, both within and outside of the State of Indiana, of high grade whiskey and other liquors, and the sale thereof, at wholesale, in the State of Indiana, and that Seagram (Indiana) sold plaintiff an average of 1,385 cases of whiskey per month in 1940, 3,464 cases per month in 1941 and 4,212 cases
27 per month in 1942 and that Julius Kessler is an Indiana corporation which, from time to time, leased the Lawrenceburg distilleries of Seagram (Indiana) for the manufacture of whiskies sold under the Kessler name; except as so admitted, deny knowledge or information suffi-

cient to form a belief as to each allegation contained in paragraph 15 of the complaint.

16. Deny that plaintiff began handling the Seagram whiskey line through Seagram (Sales) shortly after the repeal of prohibition in 1933, but admit that plaintiff began handling the Seagram line at such time and, that until November, 1946, plaintiff was one of the largest distributors of Seagram whiskeys in Indiana; except as so admitted or denied, deny knowledge or information sufficient to form a belief as to each allegation contained in paragraph 16 of the complaint.

17. Deny knowledge or information sufficient to form a belief as to whether, prior to 1934, other companies, largely in the south and east, had sold whiskey on a comparatively small scale, under the Calvert trade mark; except as so denied, admit each allegation contained in paragraph 17 of the complaint.

18. Deny that, between the period from 1934 to April, 1945, Seagram (Indiana) and Calvert were separately managed, maintained separate sales organizations and were in full and active competition in the sale of their products throughout the United States; except as so denied, admit the allegations contained in paragraph 18 of the complaint.

19. Deny that Seagram (Indiana) and Calvert, for many years prior to April 9, 1945, operated, independent of each other, numerous distilleries, rectifying plants and warehouses and marketed their products independently

28 and in competition with each other throughout the United States, and that in 1938 Seagram (Indiana)

paid \$2,575,000 and Calvert paid \$3,725,000 to Distillers-Seagram, the Canadian corporation, in the form of dividends on their capital stock; except as so denied, admit each allegation contained in paragraph 19 of the complaint.

20. Admit that on April 9, 1945, Seagram (Indiana) acquired from Distillers-Seagram, the Canadian corporation, all the common stock and other outstanding securities of The Calvert Distilling Co.; that The Calvert Distilling Co., at the time, had outstanding, in addition to its common stock, \$65,500,000 of its 6% Debentures due November 11, 1946, and 33,000 shares, having a par value of \$100 per share, of its non-cumulative 6% preferred stock (or a total par value of \$3,300,000); that Seagram (Indiana), in exchange therefor, issued to Distillers-Seagram 98,500 shares of its 6% non-cumulative preferred stock, having a par value of \$100 per share (or a total par value of \$9,-

850,000); that, in addition, Seagram (Indiana) issued to Distillers-Seagram 1,250 shares of its common stock in exchange for all the outstanding shares of common stock of the defendant, The Calvert Distilling Co., Distillers Warehouses, Inc., and Seagram, Inc. (Kentucky), then owned by Distillers-Seagram, the Canadian corporation; that as a result of said acquisition, Seagram (Indiana) acquired stock control of all the United States subsidiaries of Distiller-Seagram, including The Calvert Distilling Co.; except as so admitted deny each allegation contained in paragraph 20 of the complaint.

29 21. Admit that soon after the repeal of prohibition defendant Seagram (Indiana) obtained the marketing facilities of approximately twelve of the largest wholesale distributors in Indiana, including plaintiff; and except as so admitted deny each allegation of paragraph 21 of the complaint.

22. Admit that on August 11, 1943 the Office of Price Administration promulgated Maximum Price Regulation No. 445, under which wholesalers, including plaintiff, were permitted a mark-up of 15% over cost, but were not permitted to include as an item of cost in determining their mark-up, any increase in taxes which might be imposed by State or Federal governments after November 2, 1942; that subsequent to Maximum Price Regulation 445, an additional Federal tax of \$3.00 per proof gallon was added to the wholesalers' costs of whiskey on April 1, 1944 and an Indiana tax of \$1.00 per wine gallon was added on May 1, 1945; that inasmuch as such taxes paid were not permitted to be taken into account in fixing the 15% mark-up, it resulted that the gross profit allowed wholesalers, including plaintiff, amounted to approximately 10% on the selling price of such products; except as so admitted, deny knowledge or information sufficient to form a belief as to each allegation contained in paragraph 22 of the complaint.

23. Admit that on October 23, 1946 government regulation of liquor prices under the Office of Price Administration, was terminated, and that then or thereafter plaintiff decided to determine the selling price of whiskey purchased by plaintiff in manner which would yield a greater gross profit and greater percentage of the selling price, but defendants deny that such decision was made on
30 account of increased and increasing operating costs, and allege that such decision by plaintiff was because

of and part of an illegal combination, conspiracy, and agreement made and formed between plaintiff and other wholesalers of liquor in Indiana, on or after October 23, 1946 and prior to November 1, 1946, whereby plaintiff and various other Indiana liquor wholesalers unlawfully combined, conspired, confederated and agreed to make uniform increases in the prices at which they would sell to Indiana retailers liquor purchased and received by them in interstate as well as intra-state commerce; and, except as above admitted, deny each allegation of paragraph 23 of the complaint.

24. Admit that on or about November 7, 1946, Calvert (Sales) offered to appoint plaintiff a distributor and to supply the plaintiff with 2,000 to 3,000 cases of Calvert's whiskies per month, subject to the plaintiff continuing to be a satisfactory distributor, which arrangement was expressly understood by both parties to be terminable at the will of either party, which offer was accepted by plaintiff; that plaintiff, after receipt of advice from Calvert (Sales) of an initial allocation of 2,000 cases of whisky for the month of November, 1946, and of a further allocation of 2,000 cases of whisky for the month of December, sent to Calvert (Sales), on or about November 13, 1946 and Calvert (Sales) thereafter received Indiana revenue stamps covering such two allotments; that plaintiff further supplied to Calvert (Sales) Indiana revenue stamps to cover 2,000 cases of whisky for the months of January and

February, 1947; that none of said monthly allocations or orders of whisky were delivered to plaintiff; except as so admitted, deny each allegation contained in paragraph 24 of this complaint.

25. Admit that on or about October 17, 1946 Seagram (Sales) notified plaintiff in writing from the Seagram (Sales) executive offices in New York, N. Y. that there had been allocated plaintiff 2,106 cases of Seagram whiskies for the month of November, 1946, and at said defendant's request plaintiff, on or about October 28, 1946, delivered to defendant Seagram (Indiana) state revenue stamps covering such 2,106 cases, which cases were never delivered to plaintiff; except as so admitted, deny each allegation contained in paragraph 25 of the complaint.

26. Admit that early in November, 1946, plaintiff and all other Seagram wholesale distributors in Indiana, together with all other wholesalers of whisky in Indiana, all acting in concert pursuant to an illegal agreement and

conspiracy to restrain trade and commerce and suppress competition and to increase prices in the sale and distribution of alcoholic beverages, in violation of the laws of the United States and the State of Indiana, and not otherwise, filed with the Alcoholic Beverage Commission of Indiana written price revisions applying a 15% mark-up above their costs on all whiskies sold by them, and that upon learning of such illegal conspiracy and such action taken by plaintiff and others pursuant thereto, defendant Seagram (Sales) dispatched a telegram to the plaintiff and all other Seagram distributors protesting against the said uniform 15% mark-up and reciting Seagram (Sales) 32 policy of holding the line against price increases and asking for a report with respect thereto; and that plaintiff failed to respond to the said telegram; except as so admitted, deny each allegation contained in paragraph 26 of the complaint.

27. Deny each allegation of paragraph 27.

28. Deny each allegation of paragraph 28.

29. Admit that Calvert (Sales) and Seagram (Sales) suspended all shipments of their whiskies to plaintiff and their other Indiana wholesalers from and after November, 1946 to February 3, 1947; except as so admitted, deny each allegation contained in paragraph 29 of the complaint.

30. Deny each allegation of paragraph 30.

31. Deny each allegation of paragraph 31.

32. Deny each allegation of paragraph 32.

33

Second Defense.

For further and second defense to plaintiff's complaint herein, defendants allege:

(1) That sometime in the month of October, 1946, at and after the time of the removal of price restrictions upon the sale of liquors by the Office of Price Administration, plaintiff, and other Indiana wholesalers of Seagram products and Indiana wholesalers of Calvert products and practically all other Indiana wholesalers of liquor received and to be received by them in interstate commerce from without the State of Indiana, unlawfully combined, conspired, confederated and agreed together to apply to their wholesale costs of whisky, including the state and federal taxes included in such costs, a uniform mark-up in determining the price at which such liquors should be sold to Indiana retailers, and thus unlawfully conspired and agreed uni-

formly to increase the price of such liquors and to maintain such price increase in their subsequent sales of such liquors to Indiana retailers thereof, in violation of the laws of the United States and the State of Indiana.

(2) That pursuant to such unlawful combination, conspiracy, and agreement plaintiff and the other Indiana wholesalers of liquor above mentioned, on or about November 1, 1946, filed with the Alcoholic Beverage Commission of Indiana written price revisions reflecting such uniform increases in the price of all distilled liquors received and to be purchased and received by them in both interstate and intra-state commerce, and procured the approval thereof by the said Alcoholic Beverage Commission.

34 3. That during the formation of such illegal conspiracy, knowledge of said illegal plan, conspiracy, confederation and agreement among said Indiana wholesalers came to the defendants and specifically to the defendants Seagram (Sales) and Calvert (Sales) and to officers of other defendant corporations controlling and directing the sales policies of all defendant companies, and the filing and publication of said uniform price increases with the Indiana Alcoholic Beverage Commission confirmed to the defendants the existence of such illegal conspiracy and agreement among all said wholesalers.

4. That in order to avoid participation in said illegal combination and conspiracy and consequent penalties, civil and criminal, for violation of the laws of the United States and the State of Indiana, and to avoid the damage to defendant's valuable trade-marks, and public good will which would have resulted from participation or even acquiescence in such illegal combination to increase the wholesale and retail prices of such products at a time when the declared policy of the President of the United States was "to hold the line" against price increase by voluntary action of sellers, the defendants Seagram (Sales) and Calvert (Sales) each decided and determined to discontinue shipments to wholesalers participating in said illegal conspiracy until the same should be terminated and dissolved, and until the illegal price schedules filed with the Indiana Alcoholic Beverage Commission should be withdrawn and cancelled, and pursuant to such decision dispatched to plaintiff and other Indiana wholesalers of their products the telegrams described in paragraph 26 of

35 the complaint, to induce them to abandon such illegal conspiracy and subsequently refused to participate in

said illegal conspiracy among said wholesalers by refusing to make further shipments to Indiana wholesalers of their products so long as the wholesale prices thus illegally established remained in effect, and so long as said illegal conspiracy and the effects thereof continued.

(5) That all the alleged loss and damage to plaintiff described in plaintiff's complaint including that resulting from plaintiff's failure to receive Seagram and Calvert products, and the termination of plaintiff's Seagram distributorship, and the loss of plaintiff's contemplated Calvert distributorship, resulted from said illegal combination, conspiracy, and agreement between plaintiff and said Indiana wholesalers and the justifiable refusal of the defendants to participate therein, as hereinbefore alleged and not otherwise, and without any unlawful control exercised by any defendant over any other defendant, and without any combination, or other unlawful conspiracy or arrangement among or between any of the defendants.

Wherefore, defendants demand judgment.

White & Case,

Davis, Baltzell, Hartsock &

Dongus,

By Paul Y. Davis, (Signed)

Attorneys for Defendants.

36 Service of the foregoing answer and receipt of a copy thereof is acknowledged this 22nd day of May, 1948.

Baker & Daniels,

By William G. Davis, (Signed)

Attorneys for Plaintiff.

37 And afterwards to wit: at the May Term of said Court, on the 17th day of May, 1949, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein to wit:

Comes now the plaintiff by its attorneys and files motion for leave to file supplemental and amended complaint, which motion is as follows: (H. I.)

Come now the parties by their respective attorneys and file stipulation, which stipulation is as follows: (H. I.)

It is ordered by the Court that the plaintiff's motion for leave to file supplemental and amended complaint be, and the same is, hereby granted.

Comes now the plaintiff by its attorneys and files supplemental and amended complaint, which is as follows:

38 IN THE DISTRICT COURT OF THE UNITED STATES.
 * * (Caption—1524) * *

SUPPLEMENTAL AND AMENDED COMPLAINT.

(Filed May 17, 1949. Albert C. Sogemeier, Clerk.)

The plaintiff, Kiefer-Stewart Company, for its Supplemental and Amended Complaint against Joseph E. Seagram & Sons, Inc., Seagram-Distillers Corporation, The Calvert Distilling Co. and Calvert Distillers Corporation, corporations, and each of them, alleges that:

1-29. The plaintiff incorporates herein by reference the allegations of rhetorical paragraphs 1 to 29, inclusive, of the original complaint, filed herein on September 13, 1947, the same as if said rhetorical paragraphs were here set out in full.

30. Subsequent to said date of February 3, 1947, when said defendants, Seagram (Indiana), Seagram (Sales), Calvert and Calvert (Sales), resumed shipments to all other of their Indiana wholesalers, said defendants Calvert and Calvert (Sales) and defendants Seagram (Indiana) and Seagram (Sales), in order to punish plaintiff for having determined independently of said defendants the resale prices which it would charge for products purchased by plaintiff from said defendants, have continued to the
 39 date of filing of this Supplemental and Amended Complaint to combine, conspire and agree to refuse to sell plaintiff both the Seagram and Calvert lines of whiskies.

31. As a result of said unlawful agreement, combination and conspiracy, interstate trade and commerce in the whiskies sold by said defendants Seagram (Indiana) and Seagram (Sales) and by defendants Calvert and Calvert (Sales) and competition between said Seagram companies and said Calvert companies with respect thereto, have been, and continue to be, limited and restrained.

32. As a proximate result of said combination, conspiracy and agreement between said defendants Seagram (Indiana), Seagram (Sales), and Calvert and Calvert (Sales) and of said unlawful acquisition by defendant Seagram (Indiana) of defendant Calvert's common stock and

other securities and of the influence unlawfully exercised by Seagram (Indiana) over defendants Calvert and Calvert (Sales) as a result of said acquisition, and as a proximate result of plaintiff's refusal to enter into any unlawful agreement with any of said defendants with respect to the resale prices to be charged by plaintiff for said defendants' whiskies, plaintiff since November 1946 to the date of filing of this Supplemental and Amended Complaint, has been deprived of a continuing supply of the whiskies and other liquors sold by said defendants Seagram (Indiana), Seagram (Sales), Calvert and Calvert (Sales) and by reason thereof has suffered damage to its business in the sum of Seven Hundred Thousand Dollars (\$700,000.00).

Wherefore, plaintiff prays judgment against said defendants for the sum of \$700,000.00, together with treble damages, such reasonable attorneys' fees as shall be fixed by the Court, the costs of this action and all other and further proper relief.

Baker & Daniels,

By Joseph J. Daniels, (Signed)

William G. Davis, (Signed)

Attorneys for Plaintiff.

40 And afterwards to wit: at the May Term of said Court, on the 18th day of May, 1949, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein to wit:

Come now the defendants by their attorneys and file answer to supplemental and amended complaint, which answer is as follows:

28 *Answer to Supplemental and Amended Complaint.*

41 IN THE DISTRICT COURT OF THE UNITED STATES.
• • (Caption—1524) • •

ANSWER TO SUPPLEMENTAL AND AMENDED COMPLAINT.

(Filed May 18, 1949. Albert C. Sogemeier, Clerk.)

First Defense.

For first defense and answer to plaintiff's supplemental and amended complaint, the defendants above named (defendants Seagram-Distillers Corporation and The Calvert Distilling Company not waiving their objection to the jurisdiction of their persons and venue of this action against them), allege:

1-29. The defendants incorporate herein by reference rhetorical paragraphs 1 to 29, inclusive, of their first defense set forth in their answer filed herein on May 22nd, 1948, the same as if said rhetorical paragraphs were here set out in full.

30. Deny each allegation of paragraph 30.

31. Deny each allegation of paragraph 31.

32. Deny each allegation of paragraph 32.

Second Defense.

For further and second defense to plaintiff's supplemental and amended complaint, defendants allege:

42 1-5. The defendants incorporate herein by reference rhetorical paragraphs 1 to 5, inclusive, of their second defense set forth in their answer filed herein on May 22nd, 1948, the same as if said rhetorical paragraphs were here set out in full.

Wherefore, defendants demand judgment.

White & Case,
Davis, Baltzell, Hartsock &
Dongus,

By Paul Y. Davis, (Signed)
Attorneys for Defendants.

43 Come now the parties by their respective attorneys and come also the persons drawn and summoned as petit jurors in this Court, and they are severally examined

as to their competency for the trial of this cause, and this cause coming on now to be tried, the following persons: Harold S. Spencer, Amos Surface, Mark H. Wiles, Raymond W. Bobe, Everett O. Bridges, Phil E. Brown, Robert Albon Christmas, Roy Cummins, Joe Harold Dieseke, Wayne L. Gillis, Lillian E. McDonough, Geneve Phifer, are now duly impaneled and sworn as jurors to try this cause.

This cause is now submitted to the Court, and jury for trial, and the evidence being heard in part, is continued until tomorrow morning at 10:00 o'clock, the jury being permitted to separate under the admonition of the Court.

44 And afterwards to wit: at the May Term of said Court, on the 19th day of May, 1949, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein to wit:

Come again the parties by their respective attorneys and the defendants file answers to the plaintiff's interrogatories, which answers are as follows: (H. I.)

The jury heretofore impaneled and sworn also comes and the trial of this cause is now resumed.

Additional evidence is heard, and this cause is continued until tomorrow morning at 10:00 o'clock, the jury being permitted to separate under the admonition of the Court.

45 And afterwards to wit: at the May Term of said Court, on the 20th day of May, 1949, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein to wit:

Come again the parties by their respective attorneys and the jury heretofore impaneled and sworn also comes, and the trial of this cause is now resumed. Additional evidence being heard and concluded, this cause is continued until Monday morning at 10:00 o'clock, the jury being permitted to separate under the admonition of the Court.

1 IN THE DISTRICT COURT OF THE UNITED STATES.
 * * (Caption—1524) * *

Official Reporter's Transcript of the Evidence Given Upon
the Trial.

(Filed Aug. 26, 1949. Albert C. Sogemeier, Clerk.)

Indianapolis, Indiana,
May 18, 19, 20 and 13, 1949.

2 Be It Remembered, That in the District Court of the
United States for the Southern District of Indiana,
Indianapolis Division at the United States Court House
in the City of Indianapolis, Indiana, commencing on
Wednesday, May 18, 1949 at ten o'clock in the morning,
the above entitled cause, being at issue, came on for trial
before the Honorable Robert C. Baltzell, Judge of the said
court, and a jury, and the proceedings upon the trial were
in the words and figures following, to-wit:

Appearances:

The plaintiffs appeared by Joseph J. Daniels, Esq.,
William G. Davis, Esq., and John D. Cochran,
Esq., Indianapolis, Indiana, their attorneys.

The defendants appeared by Paul Y. Davis, Esq.,
and Gustav Dongus of Davis, Baltzell, Hartsock
& Dongus, Indianapolis, Indiana, and Thomas
Kiernan, Esq., of New York City, their attorneys.

The Court: Will you call the case?

3 The Clerk: Kiefer-Stewart Company, Plaintiff,
versus Joseph E. Seagram and Sons, Inc., et al.,
Defendants, Civil No. 1524.

The Court: All right, are you ready for the plaintiff?

Mr. Daniels: We are ready, your Honor.

Mr. Davis: The defendants are ready.

(A jury was duly impanelled and sworn.)

(Mr. Daniels opened to the jury in behalf of the
plaintiff.)

(Mr. Paul Y. Davis opened to the jury in behalf of the
defendants.)

Recess.

The Court: I neglected to ask you, do you have a stipulation of any kind that you might read into the record? There are many facts here about which there is no dispute about the organizations.

Mr. Daniels: We have one, your Honor. We will read it a little later.

Shall we proceed?

The Court: All right.

- 4 GEORGE BARRETT MOXLEY, a witness called on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct Examination by Mr. Daniels.

Q. Will you please state your name to the Court and jury?

A. George Barrett Moxley.

Q. Where do you live, Mr. Moxley?

A. Winter Apartments, 1321 North Meridian Street.

Q. Indianapolis?

A. City.

Q. What is your business?

A. Wholesale druggist.

Q. With what company?

A. Kiefer-Stewart Company.

Q. The plaintiff in this case?

A. The plaintiff in this case.

Q. How long have you been with Kiefer-Stewart?

A. Fifty-five years.

Q. What is your position with the plaintiff?

5 A. I am president.

Q. How long have you been president?

A. Twenty-five years.

Q. Kiefer-Stewart is engaged in the wholesale drug and wholesale liquor business?

A. Wholesale drug, wholesale drug sundries, liquor, cigars—everything that you will find in a drug store.

Q. How long has the Kiefer-Stewart business been in existence?

A. Since 1840. It takes its roots from a firm at Greensburg, the Daniel Stewart Company, and Kiefer, of Kiefer & Vinton, at Edinburg, Indiana, founded in '49.

Q. Was Kiefer-Stewart in the wholesale liquor business before prohibition?

A. Yes, for ever since we were organized, in fact.

Q. During that period, before prohibition, from the time you came with the company in 1894, did you have to do with the wholesale liquor end of the business? Were you connected with the wholesale liquor end of it?

A. Always, just as a department, in contact with it, on the road as a general drug salesman I sold liquor. I moved into the house later on as assistant sales manager, sales manager and finally manager. I sold liquor.

Q. Since repeal and beginning in late 1933 or 1934 have you had to do with the wholesale liquor end of the business as well as the drug end?

A. Yes, sir, in assisting the manager of the department.

Q. Have you ever been on the witness stand before on behalf of Kiefer-Stewart, Mr. Moxley?

A. This is my first experience. We have never sued any manufacturer for the completion of an engagement.

Q. Now, Mr. Moxley, will you tell the jury, just because it will be discussed here, what is a spirit blend whiskey in the wholesale liquor trade?

A. A spirit blend is a blend of whiskey of twenty per cent or more of whiskey and neutral spirits. Generally the ratios range as a rule from forty per cent whiskey to thirty per cent whiskey and the balance spirits which require no aging.

Q. Now will you distinguish between a spirit blend whiskey and what is called a straight whiskey?

7 A. A straight whiskey is the whiskey as it is made and barreled and put in storage for maturing.

Q. Unmixed with any neutral spirits?

A. Unmixed with any neutral spirits.

Q. Which is the larger seller on the Indiana market, Mr. Moxley, the spirit blend or the straight whiskey?

A. In the old days the straight whiskey and various formulas were the largest seller, but coming into this period, since prohibition and repeal, there had to be an arrangement for the stretching of the supplies that were available and so the spirit blends were adopted and allowed to label them, clearly blends of whiskey and spirits, and they have grown very rapidly for the reason that at no time, only briefly, has there ever been adequate supply

of matured straight whiskey to take care of their demand in America.

Q. That is since what year, Mr. Moxley?

A. Well, ever since repeal. When we came through from repeal there was about enough whiskey in storage if sold in straight whiskey—this was in 1934 or 1935—

about enough whiskey in storage to have supplied the
8 American public for a year and a half and, therefore, the blending with neutral spirits was adopted and they grew very rapidly.

Completing the answer to your former question, my impression is that since distillation was stopped in '42, the spirit blends grew very rapidly and I believe today that of the total sales of whiskey over the counters and over the bars in Indiana, eighty odd per cent of them are probably spirit blends.

Q. What are the leading spirit blends of the Seagram Company?

A. Seagram Seven Crown. They had Kessler and Seagram Five Crown at lower prices, but as the shortage of whiskey grew in World War II after '42, they began to concentrate on Seagram Seven Crown, withdrawing the other brands from this market, Seagram Seven Crown being the higher priced item of their line.

Q. You would say that Seagram Seven Crown was its leading whiskey, would you?

A. Absolutely.

Q. What are the leading whiskeys of the Calvert line?

A. Calvert Reserve and Lord Calvert.

9 Q. Is there any other spirit blend whiskey which is comparable in its sales appeal to the Calvert and Reserve and Seagram Seven Crown?

A. None that sell quite as well. Schenley, Old Reserve, or Black Label, as it is commonly known, is comparable and sells in some markets nearly as well as Seagram.

The Court: How does Lord Calvert range? That is a gentleman's drink?

The Witness: It is a better drink and a little more valuable. That is, they charge more for it.

Q. (By Mr. Daniels.) Not as large a sellers as Calvert?

A. Not as large a seller.

Q. Did Kiefer-Stewart handle Seagram Seven Crown when it was a distributor?

A. Since February, 1934, we took on Seagram and began to introduce it to our trade throughout the territory.

Q. Now, developing your wholesale liquor business after repeal, beginning in 1934, what efforts did you make to build up that business, Mr. Moxley—just generally.

A. First, all of our men who had been traveling the territories for years and all of our drug men and had the confidence of the retail trade, offered Seagram's to their customers beginning in 1934. Then we later or about that time began to add specialty liquor men. We now travel and have for a number of years about forty to forty-two men in the State of Indiana who have liquor, wholesale liquor salesmen's permits, which is necessary if you are going to solicit under the law of Indiana.

Q. Would you tell the jury approximately what amount of whiskey you sold in the year 1946, Mr. Moxley?

A. A little under eleven million dollars worth or about fifteen to sixteen per cent of the total sale in the state.

Q. What per centage are you selling at this time, without the Seagram and the two Calvert lines?

A. A little over three million dollars or about six per cent of the sales in the state.

May I go back just to a point of what we did in introducing our brands?

Q. Go ahead.

A. We carried Seagram to every liquor permittee throughout the state and I think we got about twenty-four hundred placements in all in about three years, that is, we did initial work, introduced it and sold continuously,—that is, we sold Seagram's somewhere around about sixty-nine per cent of the retail liquor permittees of the state, not exclusively, because others had it, but we did a lot of introductory work.

Q. You say placements. You mean in taverns, package stores, and so on?

A. Drugstores, taverns or bars.

Q. Will you explain to the jury what is meant in the wholesale liquor trade by sales leaders?

A. Sales leaders in the wholesale drug or liquor trade is a primary No. 1, 2, or 3 selling brand. To conduct a successful business most any wholesaler must distribute one of the big sellers. That is true not only with liquor, it is true with cigarettes. You can't run a cigar department as we do—we run the largest cigar department in the State of Indiana, and it has been so for fifty years—but we

could not run that department successfully without
12 Chesterfield, Lucky Strike and Camels and without
some cigars that are among the first four best sellers
in the state.

Q. What were the sales leaders in the whiskey field, Mr. Moxley, during the period from 1934 on?

A. Calvert climbed up very rapidly. Some of the brands of National Distillers, Old Granddad, Old Taylor, in the bottled-in-bond field were the particular leaders in that field. Schenley's Reserve became a good seller. Schenley had one or two bottled-in-bond that sold very well.

Q. How about Seagram?

A. Seagram by 1938 had attained leadership in the state, according to my memory, and it is a matter of record that can be verified from the State Alcoholic Beverage Department known as the ABC, Alcohol Beverage Control.

Q. Which of the Seagram brands was the sales leader or the door opener, as it is called in the trade, Mr. Moxley?

A. Originally, it was Five Crown, I should say, but since about '38 or '39 it has been Seagram's Seven Crown.

13 Q. What is it today?

A. It is still the No. 1, but it is being given a very real race in this state by Calvert as a No. 2 seller.

Q. Now would you tell the jury the effect upon the sales of a wholesaler that has no sales leader or door opener in his list of items?

A. It gives a battle all the way for your salesmen. We travel the same number of men that we did when we had Seagram's and yet we have fallen down from selling sixty-nine per cent of the retail permittees of Indiana to about fifty-four. It is difficult to open an order on items that are not in general demand.

Q. You mean to say that if a salesman goes in and has a tavern owner or a package store, the man may want to buy some smaller items, but if the salesman can't offer him one of the sales leaders or door openers, he won't buy?

A. Very frequently will not, for a particular reason, that, as we pay freight in three-case lots and he does not want a three-case lot of a certain minor seller, so he diverts his business in part to where he can get the
14 leading sellers plus these fill-ins.

Q. I will ask you whether or not in your experience and based upon your experience, you would say, since

Kiefer-Stewart has not had Seagram and has not had the Calvert line, its sales of its other items which are not leaders have fallen off for that reason?

A. Yes.

Q. Would you say they have fallen off substantially?

A. Well, our sales—

Mr. Davis: If the Court please, the witness might just answer the question. I object—

The Court: (Interposing.) Go ahead.

Mr. Daniels: He answered they had.

Q. (By Mr. Daniels.) During the time you had the Seagram line, what was your position in Indiana with respect to that line as compared to the other wholesalers who had it? Were you one of the largest?

A. One of the largest, though one of our competitors received more merchandise—not that we could not have sold as much as anyone else.

15 Q. Now, directing your attention, Mr. Moxley, to the years, two or three years before 1946, do you recall any general contacts you had with the Calvert sales people on the subject of your company taking on the Calvert line?

A. Yes, sir.

Q. Will you briefly describe those contacts?

A. There had been a few social contacts with the Calvert Company representatives and Kiefer-Stewart Company prior to the spring of 1942, asking if we would be willing to consider the Calvert line. We always indicated that we probably would if, as and when they could give us an adequate supply of merchandise to justify working on the line.

In the spring of 1942 Mr. Brightling, Francis Brightling, the representative of the Calvert Company, in Indiana, and Mr. Jeff Fields, the Chicago district manager, asked for an appointment with Mr. Waldo Lutz, the manager of our department, and me at the Severin Hotel. We joined them and they told us at that time that their distribution in

16 Indiana was wholly unsatisfactory and they would like very much, and particularly the fact that they had one local distributor that they wanted to discontinue,

Liquors, Incorporated, saying that J. C. Perry & Company had indicated or told them, rather, that they would be very happy to see us join in a co-distributorship. They wanted us to come with them at that time, but could not offer us an adequate quantity of liquor to justify our putting our

forty men out to sell it. So we suggested to them that they defer the matter until they were able to supply us more liberally.

Q. Now I will direct your attention, Mr. Moxley, to a meeting, a convention of wholesale liquor dealers at French Lick, I think on October 21st, 1946, and ask you to tell the jury whether or not on that occasion you had a conference with any representatives of Calvert Sales at that French Lick meeting.

A. Yes, sir. I had not intended going to the meeting at French Lick, but Mr. Baker telephoned me that Mr. Schwalb, the Chicago district manager—do you want all this?

Q. It is all right.

A. Mr. Schwalb, the district manager for Calvert, 17 resident at Chicago, Mr. Gollin, assistant to the general sales manager of the Calvert Company in New York, and their local sales manager at that time, Mr. Olsen, were at the French Lick meeting and would like very much to talk to Mr. Lutz and me.

Q. Who is Mr. Baker?

A. Mr. Baker is our sales manager in the liquor department.

Q. He is under Mr. Lutz?

A. He is under Mr. Lutz.

Q. Did you then attend that meeting at French Lick?

A. I joined them the following morning.

Q. Did you have a conference with Mr. Gollin, Mr. Schwalb and Mr. Olsen?

A. Yes, sir.

Q. Will you tell the jury the substance of what was said at that conference?

A. Those gentlemen said that they were ready to take us on, they needed a real distribution such as Kiefer-Stewart could give them in the State of Indiana, and would like very much to have us come with them, to which, in substance,—this was an hour or two after 18 discussing the quantities they might give us, etc.—we said that we would be very glad to help them to a real distribution in Indiana, but that we could see no reason for making us start with them on the small quantity of merchandise that they were suggesting, which, as I recall it today, was a thousand cases a month as a starter, when we had formerly indicated, the head office, that there

really would be no need for us in their picture unless they would give us upwards of four thousand cases a month.

Then we discussed the thing of two to three thousand cases as a starter and that they would carry us up to the four thousand cases, minimum, as rapidly as they could get to it.

Q. Was any agreement made at that October 23rd conference?

A. No.

Q. Did you have any further contact with any Calvert representatives of any kind while you were at French Lick at that meeting?

A. The following morning Mr. Wachtell, President of the Calvert Company, and Mr. Tubie Resnik, the 19 general sales manager, both of whom I had known through the years, telephoned me at French Lick congratulating me on the fact that Kiefer-Stewart were becoming one of their distributors for Indiana.

Q. From where did they telephone you?

A. I am not sure. I think they were passing through Chicago, but they had had the report.

Q. Anyway, it was a long distance call?

A. Long distance call, yes. I said to them, well—do you want that?

Q. Yes.

A. "Well, hold on a minute. We have not reached a conclusion as to when we shall start. We are ready and willing to start with you when you will give us an adequate quantity of liquor to do business on and that I would say today would be a minimum of two thousand cases, which must go to three and to four or else we are just not justified in putting all of our salesmen on your line."

Q. Now, do you know whether it is a fact that early in November, about the 5th of November, Mr. Lutz, Mr. Baker, of Kiefer-Stewart, had further conferences 20 with Mr. Schwalb and Mr. Tarpee, representing the Calvert Sales Company?

A. I was told they had a meeting.

Q. You were not present at those meetings?

A. I was not present at those meetings.

Q. Were you told they had a further meeting on the 11th or 12th of November at which they made some firm arrangements?

A. Yes, sir.

Q. What was your first connection with that arrange-

ment made on the 11th or 12th of November? Did you have a telephone conversation afterwards with one of the executives?

A. Yes, sir.

Q. With whom?

A. I called Tubie Resnik, general sales manager of Calvert, who was in San Francisco on that day, saying to him, "Tubie, the boys have about reached an understanding. They are talking of starting with three thousand cases, but I want it from you that we are going to have three thousand cases and that we will be carried up
21 with adequate supplies to four thousand cases as promptly as possible."

He said, "Of course. There is a shortage now, but," this,—in substance this is it.

Q. Yes.

A. "There is a shortage now, but, Barrett, we will be glad to go the whole distance with you. We know the kind of job you can do with your sales crew in Indiana and we will do everything we can to get you adequate supplies and, you bet, we are delighted to have you with us."

There were more pleasantries, Mr. Daniels.

Q. Do you recall that arrangements were made for a meeting to be held on November 23rd in Indianapolis to introduce the Calvert line to the Kiefer-Stewart personnel?

A. I was told on the 18th or 19th of November that I must arrange to be present at a general sales meeting to be put on on the 23rd of November, when there would be several of the Calvert officers and sales management here, and that I must be sure and be on hand to help act as host.

We were going to have all our salesmen in this big
22 general meeting. I think something was said about a reservation of sixty for luncheon-dinner that day.

Q. That meeting had been arranged by Lutz and Baker with the Calvert representatives, was it?

A. Yes.

Q. When next did you have any contacts with the Calvert people concerning the engagement for taking on the Calvert line?

A. On the 19th.

Q. What happened at ~~that~~ time?

A. I am pretty sure of that date. I have got a calendar.

Q. At any rate, before the 23rd of November, before the date fixed for the meeting?

A. Yes.

Q. What happened?

A. Mr. Schwalb of Chicago called me.

Q. Who is Mr. Schwalb?

A. Mr. Schwalb, the Chicago sales manager for this area, called me and told me that they were not going to be able to ship the Calvert that they had engaged to us.

Q. Did he tell you why?

23 A. He said, "We are going along with Seagram on their sales policy. We are terribly sorry but we have to go along with Seagram."

And mind you, the difference between the views of the Calvert people—

Mr. Paul Davis: Just a moment. If the Court please, I think that is not an answer.

Mr. Daniels: That may go out.

Q. (By Mr. Daniels.) Just what Mr. Gollin said to you on the telephone.

A. It was Mr. Schwalb.

Q. You covered that. What did you do after receiving that news from Mr. Schwalb?

A. Called off the meeting.

Q. Did you make any other contacts with any other Calvert people that day?

A. I called Tubie Resnik.

Q. Who was Resnik?

A. I called Tubie Resnik, the general sales manager of the Calvert Company, at his New York office. He had then returned from California to New York.

24 Q. What was the substance of that conversation?

A. I told him that we had just had an amazing telephone message from Mr. Schwalb advising that they would not supply us, and asked him if he approved of that. He stated he was terribly sorry, but they would have to withdraw from the arrangement. I used all the persuasion—

Mr. Paul Davis: (Interposing.) If the Court please,—

Q. (By Mr. Daniels.) Just repeat what was said. Don't characterize it. What you said and what he said, in substance. I don't expect you to remember the exact words.

A. In substance, I said to him, "Why, Tubie, you know this practically crucifies our department. You can't do that to us. You have made these engagements. You have been soliciting our business for four or five years and we expect you to go along."

Well, he was sorry, he could not do it. I said, "Well, you know you are placing yourself in a very vulnerable position. We keep our engagements and we expect you to keep yours."

Q. Did he say why he could not complete his engagements?

A. He said he had to go along with the other side of the house.

Q. Who did he mean by that?

A. Seagram, and speaking of the other side of the house, they occupy a floor or two in the Chrysler Building, the Seagram section is in the south side and the Calvert section is in the north side of the same building, same floors.

Q. Let me ask you when you had another contact with any Calvert representative after that news came to you.

A. Oh, there were two or three occasions when I telephoned Tubie.

Q. Mr. Resnick, you mean?

A. Mr. Resnick—trying to induce him to come on and make good in his engagement to us.

Q. What was the outcome of those conversations?

A. Always told me that he could not do it. Then we reached the point in which he would not answer my telephone calls. On two or three, and I can give you the date of those if you would like them—finally I got him by using another name.

Q. Whose name did you use?

A. Mr. Diedrich's?

Q. Who is Diedrich?

A. One of my associates.

Q. In the Kiefer-Stewart Company?

A. Yes.

Q. What was the result of that conversation?

A. Well, the same old review, that they owed us the merchandise engaged to us, promised to us, we had made all our plans to sell their merchandise for them, and he was breaking his engagement.

Q. What was his reply?

A. "I am sorry, but I can't do it."

I said, "Now, hold on, Tubie. You are sure crucifying us and while we have been in business a hundred and nine years and never sued anybody, I am afraid you are going to put us in position that we will have to sue for fair treatment."

Q. Now, let me direct your attention, Mr. Moxley,—

27 A. (Interposing.) Do you want the rest of that—
he hung up on me.

Q. That is enough. He said he took the same position,
that they would not deliver the goods?

A. Oh, always.

Q. Do you recall the date on which OPA control over
the prices of liquors and other matters ceased, approxi-
mately?

A. October 23rd.

Q. What year?

A. 1946.

Q. Had there been a period, Mr. Moxley, in the sum-
mer of '46 when it seemed as though OPA might be lifted?

A. As it was originally written, it was scheduled to be
lifted in July.

Q. Do you recall any consideration which you and the
executives at Kiefer-Stewart gave to the price situation in
that connection?

A. Yes, sir.

Q. Will you tell the jury about that in your own words?

A. As we saw the termination of OPA, we put our
figure experts to work on the subject. We knew we
28 had a serious readjustment coming and we determined
that with the expiration of OPA we would sell our
merchandise on a fifteen per cent markup, less an allow-
ance or freight. That is prepaid throughout the State of
Indiana. We had not prepaid back in the period when we
had a seventeen and a half cent markup.

Q. What had been the price arrangement under OPA,
Mr. Moxley?

A. Under OPA we did not deliver. We had a markup
of, an overall markup first of seventeen and a half and
then about 1943 that was reduced to an overall markup by
the OPA regulation, of fifteen per cent f. o. b. point of
shipment. That is, at Indianapolis.

Q. Now, was there a further restriction on that with
respect to future taxes?

A. There was a law passed that any tax that was im-
posed on liquor after June 1st, I believe it was, or July
1st, 1942, any added taxes you would not be able to add.
That was not a law, that was an OPA regulation. You
would not be able to take any markup on that tax.

29 Q. What taxes, if any, were enacted by the State
or Federal Government after that?

A. In 1944 the Government raised the tax, Federal tax, from six dollars to nine dollars a gallon, which made three dollars additional that we could not take any markup on, though the tax cost us just as much as if it was the contents of the bottle. In 1945 the State raised our tax from \$1.08 a gallon to \$2.08 a gallon, so there is an additional dollar there, the added taxes on which we could take no markup amounted to \$4.00 per gallon.

Q. So that during the year 1946 until OPA expired you were taking a fifteen per cent markup, not including in the costs this \$4.00 of additional taxes?

A. Yes.

Q. You did not have to deliver the product to the retailer, is that correct?

A. No.

Q. What you determined to do in July was to take a straight fifteen per cent markup on all your costs, but you would deliver your product at your expense to the retailers, is that correct?

30 A. Yes, sir. That fifteen per cent markup, mind you, gave us a gross profit on selling price of 13.04. We figured that out of town—

Q. (Interposing.) You mean 13.04 per cent?

A. 13.04 per cent. We figured that our out-of-town deliveries on estimate at that time, with the increased freight rates, would run about one and a half per cent on sales. We later have determined it does not run quite that much. It is nearer \$1.25. But with that one and a half per cent from 13.04, it only leaves eleven and a half per cent gross profit to work on.

Q. What expenses did you have to pay out of that?

A. All of our operating expenses of every character.

Q. Salesmen's commissions and salaries?

A. Salesmen's commissions and salaries, interests on borrowed capital—every type of selling expense—circular mails, etc.

Q. Warehousing?

A. Then we get back to the warehousing expense: all warehousing labor, rental and everything that goes to make up the general expense, and by the way, warehousing labor since the beginning of the war has doubled, gone
31 from fifty cents an hour, basic, to a dollar and a dollar two cents an hour.

Q. What had been the experience with freight rates?

A. Freight rates had advanced 93 per cent and an added

thing that most merchants forget is that there is now a minimum charge for ten pounds or ninety, for any quantities, of \$1.55, plus tax. In other words, if you send one case of liquor to any point in Indiana, to Franklin or to South Bend, the minimum freight rate is \$1.55 plus tax, which makes \$1.58½.

Q. Well, now, did OPA actually terminate for any length of time in the summer of '46, Mr. Moxley?

A. Very briefly, as I remember it it was supposed—it was about ten days, during that time when within our Executive Committee and with the advice and under the figures of the management of the department, we had determined on our fifteen per cent overall markup, and that we would get our price lists ready to shoot it as soon as it was definitely determined that there would be no continuation of the OPA, and I think that our list was about 32 ready for the printer when we got word along the 12th or 15th of July that there would be an extension of OPA.

Q. There was such an extension, was there?

A. There was an extension of OPA that ran until October 23rd.

Q. Now when it appeared in October, sometime in October, that OPA was going to expire, this time permanently, what did you do about your prices?

A. We discussed it in our liquor department and determined to go right ahead, perfect our list, on a fifteen per cent markup basis and get ready to put it out, to mail it.

Q. Did you review the figures and statistics you had before you previously?

A. Just briefly. I relied very largely on our auditor and the men in the department, both of whom are very good figure men.

Q. You saw no reason to change the opinion you had reached in the summer?

A. Could not possibly find how we could do business on any less, permanently, and give satisfactory service to the retailer and to the distiller.

33 Q. Now do you recall a meeting of the Wholesalers Association of Indiana at the Warren Hotel on October 31st, 1946, Mr. Moxley?

A. Yes, sir.

Q. Who was present there for Kiefer-Stewart?

A. Mr. Lutz, Mr. Diedrich, and myself.

Q. Do you recall any other individuals that were present at that meeting by name?

A. I think that some twenty-five firms were probably represented from the state.

Q. Any representatives of the Alcoholic Beverage Commission there?

A. Yes, Mr. Leffler Anderson.

Q. Who is he?

A. The Vice Chairman of the Indiana State Alcoholic Beverage Commission.

Q. Anyone else from the Commission?

A. And Mr. Merton Johnson, trade relations representative of the Alcoholic Beverage Commission.

Q. Will you tell the jury generally what was the purport of the discussions at that meeting?

A. As I recall it, the president—

34 Q. (Interposing.) Who was the president?

A. Mr.—of Fort Wayne—I will give it to you in a moment—and Mr. George Fate. They were both present. They spoke something of the conditions that were the only reason for calling the meeting.

Q. What were those conditions?

A. That business generally was in a complete state of chaos, partially mental, with apprehension of what was going to be done, what would be going on, what would be the final result, so there was considerable discussion if distilled spirits, liquors, whiskeys, blends became freer, as to what the wholesaler and the retailer would do with his surplus, accumulated stocks of rums, brandies, of potato spirit blends, of cane blends. A potato spirit blend is made—is a blend of whiskey, I might add to you, a blend of whiskey and of distilled spirits made from the starches of potatoes. That distillation had been permitted in spirits. Then we had a cane spirit which is made from the cane of the southern states and Cuba. And those spirits had been used in blending with some whiskeys from the States.

35 Q. Had the wholesalers in Indiana generally stocked up on those items?

A. Pretty fully, too fully, in fact, in view of the turn and resistance of the consumer to drinking potato spirit blends or cane spirit blends.

Q. Was that different from the conditions during the war, Mr. Moxley?

A. They were.

Q. Was the attitude in October, 1946, different from the attitude during the war?

A. Oh, yes, during the war people were perfectly satisfied. The consumer would rather take a potato or cane spirit blend than nothing and so frequently he could not get his choice of grain spirit blends.

Q. That was due to what, shortage of supply?

A. Due to the fact that there was no distillation of grain spirits from October 8, 1942 to well into '46, the close of 1945, we will say.

Q. Well, now take Kiefer-Stewart, for example, did it have some excess stock of those blends?

A. Yes, sir.

Q. To your knowledge, did a lot of other whole-
36 salers have the same situation?

A. A lot of them had and they were worried, I know of some wholesalers by report.

Mr. Paul Y. Davis: I think, if the Court please, I will object to the report.

Q. (By Mr. Daniels.) No report. You know of your own knowledge that some did?

A. Yes, that some wholesalers sold their surplus stocks of rums at as much as ten dollars less than the tax thereon in order to get rid of them, get their shelves clear.

Q. Now, that over-supply of those unmovable or slow moving items was one of the causes of confusion and chaos in the industry at that time?

A. There was great apprehension.

Q. What were some of the other causes, Mr. Moxley?

A. Whether we were going to pay freight or not, what about it, freight has advanced so much, and it is scheduled, if the new schedules go into effect, it will amount to ninety-
37 three per cent. How can that be absorbed? How can
of business and, of course, anybody with a spoonful
of brains knew—

Mr. Paul Y. Davis: (Interposing.) Just a moment, if the Court please—not responsive to the question, not a response to a proper question.

The Court: I wonder if we can't get to the dispute between the parties.

Mr. Daniels: We are getting to it, your Honor. I am trying to set the stage. I want Mr. Moxley to describe the October 31 meeting.

The Witness: Should I complete the sentence I was in?
Mr. Daniels: No, that is not important.

A. (Continuing.) I might say most anybody knew that—

Mr. Paul Y. Davis: (Interposing.) I object to that, if your Honor please, to the testimony as to what was known.

The Witness: I don't understand. I have never been on the witness stand before.

38 Q. (By Mr. Daniels.) Will you tell the jury whether you made a talk at that meeting on October 31st?

A. After Mr. Hagemier, one of the leading attorneys of the local bar,—

Q. (Interposing.) Do you remember who talked at the meeting besides yourself?

A. Mr. Hagemier, Mr. Johnson, the Fair Trade man, I talked, and, oh,—there were a number discussed the subject.

Q. What, in substance, did you say at that meeting?

The Court: The Chicago meeting?

Mr. Daniels: The meeting October 31st in Indianapolis.

A. As briefly as I can get it, I said to the [redacted] that I was called on—mind you, that I was no prophet, I could judge the future only by the past, that I had lived through the readjustments of World War I when we saw business, general business,—no liquor business at that time—decline within the two years from '20 to '22 some twenty-nine

39 per cent, and profits practically out of the window, that we in our house had been over the subject thinking of every possible economy that we might effect. We had made up our minds that we would have to make substantial readjustments, that we knew our costs with the receding volume would be hard to control, that I felt that none of us, no matter how optimistic, could hope for sales to continue through a period of two or three years anywhere within a range of their present wartime volume, that boom was bound to be over sometime; as to whether it would be immediately or through the succeeding three or four years was a matter of guess. I said to them that we had been into a study, not only in July, but more lately, and had determined to put our prices on a fifteen per cent markup, that we were so preparing our price list, that we were going to try it, because we knew we needed it. We

knew the business would require it if we were to give satisfactory service. You know you can trim your job in service to meet a price, but nobody is ever satisfied with it.

And then I said, "Gentlemen, we had determined
40 to put on this fifteen per cent markup," but I thought every man there should be at liberty to put on any markup that he saw fit. Later some number thought seventeen and a half per cent was a minimum that should be taken, but I said to them, "Well, that is all right. Fifteen per cent is where we are starting. We will reserve complete liberty of action to make changes as we find they are required, in meeting the general conditions of sale, but, mind you, we will go into no price agreement with anybody at any time."

Q. (By Mr. Daniels.) Was any such agreement made at that meeting or at any other time?

A. No, sir, never with us or any meeting we were in, never since 1906 have we entered into an agreement with a competitor.

Q. Now, Mr. Moxley, let me ask you this: During November did you receive any shipments of Seagram whiskies from the Seagram Sales Company or any Seagram company?

A. No, sir.

Q. Did you receive any during December?

A. No, sir.

41 Q. Have you received any since sometime late October, 1946?

A. We have had a lot of promises, but never got a bottle of whiskey.

Q. Have you ever received any shipments of Calvert whiskey?

A. None—just promises.

Q. Is it a fact that given—

A. (Interposing.) By the way, may I add there that we sent stamps? Shall I explain?

Mr. Davis: Just a moment. If the Court please, I think the testimony should be in response to questions.

Q. (By Mr. Daniels.) Did you send stamps to Calvert or Seagram for whiskey for delivery to you?

A. To the extent of about forty-nine thousand dollars worth to be attached to the liquor.

Q. Will you explain to the jury how that stamp purchase matter was worked there?

A. Under the state law, we are not permitted to sell any whiskey that has not paid the state tax. That
42 state tax is evidenced by the attachment of a stamp, a fifty cent stamp.

The Court: I suspect most of the jury know that.

The Witness: How's that?

The Court: Go ahead.

A. (Continuing.) That fifty cent stamp also carries the overage for enforcement of eight cents a gallon, which makes two cents a quart. That has to be bought of the Alcoholic Beverage Control Division, paid for in cash, and as a matter of expeditious handling, we sent it on after we filled orders with the distillery, we send them on to the distillery to attach as they are running the bottles through the bottling room. Fifty cents for a quart, forty cents for a fifth, twenty-five cent stamp for a pint, twelve and a half cent stamp for a half pint.

Q. (By Mr. Daniels.) You did buy those stamps and send them to Seagram and Calvert?

A. We bought the stamps and sent them to Seagram and Calvert Companies; though we had orders for
43 more than that, we let them know the others were coming as quickly as they were ready in the bottling room.

Q. Did you ever get any liquor to which those stamps were attached?

A. No—just promises.

The Court: Would it be their job to attach the stamps or could you get liquor sent to you without them and then your company attach the stamps? Really, your company is the one that is responsible.

Mr. Daniels: They sent the stamps on and the distillers put the stamps onto the liquor. He sent them to their company.

The Witness: I might qualify that further. On import items we buy the stamps. It would be impractical on import to send stamps to Scotland.

Q. (By Mr. Daniels.) You mean on items imported from Europe?

A. Yes, from Europe, about the world, we buy the stamps here, upon up the cases on imported liquors
44 and attach the stamp within our house. We cannot sell a bottle or package of anything without the stamp being attached.

Q. But on whiskies made in this country, you send the stamps to the distiller?

A. Yes, that is right, is so much simpler as they come down the bottling line.

The Court: Suppose we adjourn now until two-fifteen.

Now we are going to adjourn at this time until two-fifteen, ladies and gentlemen, and during that time you will be permitted to separate and go your way. I want to caution you not to talk to anyone about the case or permit anyone to talk with you about it or in your presence or hearing. If there should be anything in the newspapers at any time while we are trying this case, I wish you would not read such an article, because it is your
45 function to decide the case under the evidence that is introduced here in court and not on what someone else might say or what some newspaper might say. So keep those things in mind at all times while we are trying the case and be back at two-fifteen.

Whereupon, At One O'clock P. M. Court Adjourned To Reconvene At 2:15 O'clock This Afternoon.

46

Indianapolis, Indiana,
Wednesday Afternoon,
May 17, 1949,
Two-fifteen o'clock P.M.

The Court met pursuant to adjournment and the trial was resumed as follows:

GEORGE BARRETT MOXLEY, a witness on behalf of the Plaintiff, being recalled, testified as follows:

Direct Examination (Resumed) by Mr. Daniels.

Q. Mr. Moxley, do you know General Frank Schwengel?

A. Yes, sir.

Q. Will you tell the jury who he is?

A. He is President of Seagram's, one of the Seagram Companies of America.

Q. Joseph E. Seagram & Sons?

A. Joseph E. Seagram & Company, with headquarters

in New York City. Primarily, I think, public relations man.

Q. Was he in that position?

A. Yes.

47 Q. Directing your attention to the date of December 4, 1946, I will ask you if you had a conversation with General Schwengel on that day.

A. Yes.

Q. Where?

A. In our office—no, either at the office of the Alcoholic Beverage Commission or in our office.

Q. And later did you have a conversation with him at your house when he was there for dinner that evening?

A. Yes. He stated he was here to see the distributors, the four distributors.

Q. Distributors of what?

A. Seagram's in Indianapolis, and I said, "All right, I will tell you what I'll do, to save you some time. I will invite them to dinner at my house. Will be very glad to entertain you."

Q. Now directing your attention, for the sake of saving time, to the question of suspension of Seagram's shipments and Calvert's shipments to Indiana wholesalers, which had been going on for approximately a month at that time, I will ask you what the substance of your
48 conversation with General Schwengel on that subject was at that time.

A. At the dinner?

Q. At the dinner, or in the afternoon, whenever it occurred.

A. The General was rather insistent that we should go along on an OPA basis of prices and we felt that we could not maintain ourselves long in that position.

The Court: Was that after the OPA had been set aside?

The Witness: Yes, the OPA had been set aside on October 23rd.

Q. (By Mr. Daniels.) Did the General state to you that you should have consulted with him before you filed your prices?

A. Yes, sir.

Q. What did you say to him on that subject?

A. We in turn said to him, "It would have been equally courteous if you had discussed with your Indiana dis-

tributors the prices that you wished filed instead of just ordering it done."

Q. Was that the substance of the conversation that night at dinner at your house?

A. More or less.

Q. On that subject?

A. On that subject, yes.

Q. Is it a fact that one of your guests that night, who was an Indiana wholesaler and distributor of Seagram's, was perhaps impolite to the General?

A. It might have been so considered. One of them got a little rough with him, and we broke up that part of the conversation—I apologized to the General and said, "This is to be a pleasant evening. I hope you don't feel hurt."

He said, "Certainly not."

Q. Did you see the General again the next day, December 5th, 1946?

A. The next morning.

Q. Where?

A. He came to Kiefer-Stewart's office.

Q. You talked with him?

A. I had a visit with him and my partner, Kiefer Mayer, Executive Vice President, the other side of the house—I called him to come back for a visit with the General. I knew he knew him or knew of him. The General was a friend of General Tyndall from here.

Q. Did Mr. Mayer and General Schwengel have a conversation in your office?

A. Yes.

Q. Give the jury just briefly the subject of that. Make it brief, because Mr. Mayer himself will testify on that subject.

A. Well, Mr. Mayer asked the General what was his problem and the General related it, and Mr. Mayer said to him, "Well, now, you know, General, we can't enter into an illegal engagement with you and the other wholesalers."

That is the substance of it.

Q. Did you see the General again sometime in March of 1947?

A. Yes.

Q. On what occasion was that?

A. There was a meeting in New York of the Licensed Beverage Institute.

Q. What is that, briefly?

A. The Licensed Beverage Institute, its membership consists of distillers and a certain number of wholesalers—in no sense commercial. It is organized for the purpose of building ideals into the industry.

Q. Are you a member of the board of that Institute?

A. Yes.

Q. Did you see General Schwengel at that meeting?

A. I found him sitting opposite me.

Q. Did you have any conversation with him at those meetings of the Institute on the subject that is involved in this case?

A. No, just a reference.

Q. Did you see him at his own office later?

A. He asked me to meet him at his own office the second day.

Q. Did you do so?

A. I did.

Q. Tell the jury the substance of your conversation with him at that time.

A. At his office, we discussed the fact that he was delivering both Calvert and Seagram in Indiana to the other distributors and I thought his treatment of us was very unfair. He insisted that we would get the merchandise which was then on an allocation basis, would have totaled about sixteen thousand cases, for which they had stamps for almost enough of it, and I thought we were going to get that part of the merchandise, and he said, "Of course, you are entitled to it is my point of view, but you understand, Moxley, I have nothing to do with sales."

I said, "Yet you are the President of the Company."

Q. Did you ever get the whiskey?

A. Not a drop.

Q. Just one more question. I think, on a different line, Mr. Moxley. During 1946 what would your average monthly sales be? What were they in terms of cases per month? Do you remember?

A. Somewhere between twenty and twenty-five thousand, as I recall it. That is a statistical fact that can be supplemented.

Mr. Daniels: That is all. You may cross-examine.

53 *Cross-Examination by Mr. Paul Y. Davis.*

Q. Mr. Moxley, who was present on the occasion of the meeting at your house with General Schwengel?

A. Mr. Fate, the secretary of the Wholesale Liquor Dealers Association, Mr. Merton Johnston, the Fair Trade representative, Mr. Beck, of Fred Beck & Company, one of the distributors for Seagram, Mr. Fansler, of National Liquors, another distributor, Mr. James Bradford, I think Sam Moxley, my nephew, who lived with me, and I.

Q. Mr. George Fate was secretary of the State Wholesale Liquor Dealers Association?

A. Yes, sir.

Q. Mr. Johnston was Mr. Merton Johnston, the Fair Trade Director of the Alcoholic Beverage Commission?

A. Yes, sir.

Q. Was Mr. Will Adams of Terre Haute at that meeting?

A. No, just the local distributors of Seagram plus these other two gentlemen I named, and my nephew, Sam Moxley.

Q. Now that occurred after about, you said a month
54 after Seagram and Calvert had quit shipping to any other distributors?

A. More than a month.

Q. Well, what was the date of that?

A. The 4th of December, 1946.

Q. The 4th of December?

A. 1946.

Q. Was that before or after the meeting of the Wholesale Liquor Dealers Association called to discuss a modification of this markup?

A. That was about five weeks afterwards, I should say.

Q. Well, after the new markup had gone into effect and Seagram and Calvert stopped shipping, there was another meeting in which the question of modifying the fifteen per cent overall was discussed, wasn't there?

A. Yes, that is right.

Q. Now was this meeting with General Schwengel before or after that other meeting, second meeting?

A. I think, I am not sure, I have forgotten about that.

Q. To refresh your recollection, wasn't the meeting that was held to consider modifying the fifteen per
55 cent overall held December 3rd?

Mr. Daniels: I am going to object to that question, if your Honor please. There was no showing that a meeting was held to modify, as counsel has said, the fifteen per cent overall.

Mr. Davis: Mr. Moxley testified there was.

The Court: You have reference to the October 31st meeting?

Mr. Davis: No, a meeting which I think was held December 3rd and I am trying to fix the Schwengel meeting with what I think was the December 3rd meeting.

Mr. Daniels: I have no objection to talking about the meeting, but I object to counsel characterizing it—

Mr. Davis: (Interposing.) He is testifying in the record on that subject.

The Witness: You mean my testimony is that we met to consider modifying the fifteen per cent?

Mr. Davis: I mean, the record will show—

56 The Witness: (Interposing.) That isn't the question, as I understood it.

Q. (By Mr. Davis.) You, together with Mr. Beck, Mr. Fansler, and Mr. Bradford had been appointed on a committee, had you not, to discuss that matter with General Schwengel?

A. Not that I ever heard of.

Q. Had Mr. Fate been appointed on such a committee?

A. I never heard of the appointment of the committee. The gathering of these gentlemen at my house was on my initiative, trying to be courteous and nice to the General.

Q. Well, all four of you were trying to induce General Schwengel and his companies, the companies which he represented, to resume shipments, were you not?

A. Individually, I presume. We were using all our pressure that we could with Tubie Resnik, of the Calvert Company to come across with our merchandise that he had engaged to us.

Q. Well, you were also using pressure to induce the Seagram companies to come on with the merchandise
57 that they had customarily been shipping you, were you not?

A. Yes, sir, not pressure, all persuasion.

Q. And you and Mr. Beck and Mr. Fansler and Mr. Bradford all had a common interest in that objective, didn't you?

A. We would have liked to have had merchandise.

Q. Didn't you have a common interest?

A. I don't know how to answer that.

Q. Now, Mr. Fate had no such interest except that he was secretary of the Association?

A. This dinner came about more as a social than a business dinner and a desire to be courteous and nice to the General and simplify his visit here, make it more pleasant.

Q. Well, when you testified at that meeting that the General was insistent that you should go along on an OPA basis, do you mean that the General was trying to sell you or induce you to refile the OPA price schedule?

A. I assume so, if that was his argument.

Q. Well, what started that argument?

A. I don't know.

58 Q. Well, who brought up the subject at the occasion of that dinner at your house?

A. I can't tell you which one of my guests brought it up.

Q. What did he say, in substance, that provoked that remark from the General?

A. I don't recall.

Q. What did the General say that you have characterized as being insistent?

A. Well, he said when we got into that subject of price filing, thought we ought to go ahead and file, and he made his point as others discussed it around the table, that we ought to accept their point of view individually or collectively.

Q. Well, did anyone present on that occasion in your presence suggest that the markup might be modified by eliminating part of the tax from the application of the markup, but not all of it?

A. I don't remember that statement.

Q. Do you mean any discussion on that subject at that meeting when General Schwengel was here?

A. You mean of a compromise on the markup?

59 Q. Yes.

A. Somebody suggested, as I recall, either there or later, that they might apply to the wholesalers of this state the same price at which they billed to the monopoly states which were approximately a dollar less a case than they were billing to us.

Q. Well, that is a little bit far off, isn't it, Mr. Moxley, from the question of whether the fifteen per cent markup should be applied to part, but not all, of the tax?

A. Well, it was a way of lowering the cost to wholesalers.

Q. Yes, but wasn't that suggestion also made that the wholesalers should modify their filings by applying the fifteen per cent markup to only a part of the new tax, but not to all of it?

A. At this time, I don't recall.

Q. Now, who was the guest that insulted General Schwengel?

A. I would not say that the General was insulted.

Q. Well, then, who was the guest to whom you referred as having been impolite to the General?

A. James Bradford.

60 Q. Now, I believe you saw the General the next morning?

A. Yes, sir.

Q. He was at your place of business?

A. Yes, sir.

Q. What was the proposal that he made that caused Mr. Mayer to say he could not enter into an illegal agreement?

A. His proposal was that we should agree with him to apply his suggested prices.

Q. Putting that in another way, he said, "You folks ought to go back to the old OPA price and then we would be willing to ship you." Wasn't that it?

A. Yes, something to that effect.

Q. Now, when had you filed price postings with a fifteen percent overall markup?

A. We had made them up the last week in October and we filed, as I recall it, on either the last Friday in October or Thursday or on the 1st day of November.

Q. Now how many different beverage lines were you handling at that time, alcoholic beverages, I mean.

A. Alcoholic beverages—or, four major lines, a half dozen or more minor lines. Then all types of imports.

61 Q. Just roughly and as nearly as you can, how many different items of alcoholic beverages, I mean separate brands and separate packages?

A. You mean liquors, brandies, imports, and everything that had alcohol in it?

Q. Yes, that had to have prices filed with the ABC.

A. That could be only a guess with me today. It can be offered as evidence by our price lists.

Q. Well, you were one of the larger wholesale dealers in the state, were you not?

A. We were the largest.

Q. You had the most expensive line in the state?

A. Yes.

Q. You say that on each one of those items of alcoholic beverages that had been released from OPA control you prepared price postings for filing with the State Alcoholic Beverage Commission during the last week in October, and filed those either the last of October or first of November?

A. As I recall it, we did not have time to get the list up complete, but we filed with the Alcohol Beverage
62 Control a statement that we would take an overall markup of fifteen per cent, and I think the list was gotten in to them in the course of the next few days.

Q. Well, then, you did not prepare in the last week in October for filing the first day of November or the last day of October?

A. Our department people were working on it.

Q. I believe you said that in arriving at the decision to use that fifteen per cent overall markup, you considered various items of cost, of increased cost of doing business.

A. Yes, sir.

Q. I believe you also said that you had concluded that by taking the fifteen per cent overall markup you could allow freight to your purchasers and that that would be an additional item of cost that heretofore you had not had?

A. Yes.

Q. Now I will ask you to state whether or not in posting your prices either in detail or by letter you advised the State Alcoholic Beverage Commission that you were cutting the price by the amount of allowed freight.

63 A. In any filing we would have given them would have said "freight allowed in Indianapolis."

Q. That is to say, anything you filed on that fifteen per cent markup with ABC would have said "freight allowed from Indianapolis"?

A. Yes, sir.

Q. You are pretty sure you did that?

A. Well, as to the detail—I don't follow the detail. It was ordered to be gotten up in that form.

Q. Now, the last day of October was the day of that meeting in the Warren Hotel, where you made the speech, wasn't it?

A. One of them.

Q. One of the what?

A. One of the speeches.

Q. Well, you testified about a meeting at the Warren Hotel?

A. Yes, sir.

Q. Where the matter of the chaotic condition in the industry was discussed and the matter of new prices was discussed, that was held the 31st day of October?

A. Yes, sir.

64 Q. You have testified there were some twenty-five wholesalers or their representatives in attendance, is that right?

A. I think so.

Q. Have you consulted the records of the Association to determine how many were in attendance?

A. No, sir.

Q. Now, the only persons that you have mentioned as being in attendance other than yourself were representatives of the Alcoholic Beverage Commission or attorneys, were they not?

A. I presume so. That is a matter of record. Do you want some more names?

Q. Yes, I want to know the names of everybody that you remember that was at that meeting.

A. I could not give you the name of every man in this room today.

Q. Well, Mr. Moxley,—

A. (Interposing.) Let me amplify it. It is two and a third years ago, but I would say this: There was Mr. Beck, either one or two Becks, Mr. Hagemier, Mr. Fansler,

I think Mr. Manthe of Fort Wayne was there, Mr. Gustav Ziegler of Fort Wayne. There must have been a representative or two from South Bend.

65 Q. Who?

A. Mr. Stout. I have forgotten his first name, and Mr.—the manager of the LaSalle Liquor Company of South Bend.

Q. Do you remember his name?

A. It will come to me in a moment or two. It is my impression there were one or two there from Gary.

Q. Do you remember any names?

A. Either Mr. Cassidy or Mr. Murray of his firm, Gary Wine & Liquor. I am not sure of the representatives of the other firms. Of East Chicago, there was a repre-

sentative, either one or two would be my guess, from the Midwest Liquor.

Q. Where is that?

A. East Chicago. And then there was Mr. Adams of Vigo Liquors at Terre Haute.

Q. Who was that?

A. I am confident he was there. I think there was a representative or two, maybe Clarence Bicking of Evansville. Maybe another from—as to who else from the southern part of the state I have forgotten, but upwards of twenty-four people.

66 Q. Was there a Mr. Barrett from Lawrenceburg there?

A. I am confident he was there.

Q. Will Adams of the Highland?

A. I named him. I gave him as Vigo, but he is Highland. Give me a list of the membership, I could give it to you much more readily.

Q. As a matter of fact, nearly everybody was there represented in some manner?

A. I am under the impression that at this time there were about thirty-seven wholesale permittees, and I am quite sure some of them were absent. It seems to me about twenty-four or twenty-five people there.

Q. You remember in substance what you said on that occasion?

A. In substance?

Q. About the fifteen per cent markup that you were about to take?

A. Yes, sir.

Q. What did any other dealer there say?

A. Oh, there was a good deal of discussion.

Q. Well, did anybody else make a speech like you did?

67 A. I did not make a speech. My speech was a few remarks. What we had determined to do.

Q. Now, without giving the back and forth what you remarked or any remarks, did any other dealer make any remarks on the subject of post-OPA markup?

A. There was a great deal of apprehension expressed as to the readjustment that was coming to us all, and in that discussion there came up from some angle as to whether they could get by presently or on a fifteen per cent markup or whether they should go back to seventeen and a half per cent markup. I remember something like that.

Q. Who was advocating seventeen and a half?

A. I can't tell you.

Q. Do you remember any individual there who made remarks favoring the seventeen and a half per cent over-all?

A. I remember some, but I could not name them. I did not charge my mind with that.

Q. Now Mr. Hagemier made a speech, didn't he?

A. Yes, sir.

Q. Do you remember what he said?

A. He reviewed the general economic conditions, the outlook economically, nationally, on all types of products—not only whiskies but everything as he saw it, and that, of course, I remember something to the effect that we would have to use a lot of common sense, that in the adjustment that was before us we would have to practice every practical economy and, in fact, handle ourselves with common sense, but as an attorney he reminded us of the fact that while we had every right to counsel together, we under no circumstances had any right to agree on prices.

Q. Well, Mr. Hagemier was and is a lawyer?

A. Said to be a very excellent one.

Q. And was he there employed by the Association or by a particular member or members of the Association?

A. It is my impression that he was not employed by the Association. I know that he is a member of the firm—I know by report that he is a member of the firm of Fred Beck Company, and a very fine gentleman.

Q. But he did give the assembled wholesalers the legal advice that while they had a right to counsel about prices, they had no right to agree upon prices?

69 A. You have got a word in there that he did not put in. He did not say that we had a right to "counsel" about prices. They could counsel over and about their problems, that they were facing and would face, but never did he tell us they had a right to counsel about prices.

Q. Well, of course, you did discuss prices at that meeting?

A. I had, in telling them what Kiefer-Stewart were doing, were going to do, regardless.

Q. And other people did the same thing, did they not?

A. Ask that question again.

Q. I will ask it in a little fairer way. That was unfair.

Other people made remarks on the subject of prices; that is to say, on a proposed markup?

A. I think some of us did, yes, sir.

Q. And other people announced what their firms were going to do?

A. I don't remember others announcing what their firms were going to do.

Q. Then Mr. M. A. Johnston made a speech, did he not?

A. Yes.

70 Q. Do you recall in substance what he said?

A. That the Alcohol—something to the effect that the Alcohol Beverage Association—

Mr. Daniels: (Interposing.) Commission.

A. (Continuing.) Commission would approve any fair prices, that they wanted to see no nefarious policies followed, designed to destroy the smaller wholesalers of the state. They wanted to see fair play and if the prices that were brought in and filed by an individual member looked fair, the Commission would approve it—something to that effect—and a pleading, “Be fair”—just a pleading, “Be fair, let's put this business of the State on a basis where it can command the respect of the public.”

Q. And didn't he also state in substance that the Commission would accept filings by letter without detailed calculation in order that they might go into effect within the period of five days?

A. I am not sure, but I think he did, such filings of costs to be supported as early as possible by detailed figures.

71 Q. You remember that he said something about that?

A. No, but that was the inference.

Q. Well, did he say that?

A. That is two and a third years ago—I can't tell you.

Q. When, Mr. Moxley, did Kiefer-Stewart Company make its first detailed price filing on Seven Crown Whiskey after the 31st of October, 1946?

A. I think that was December—

Mr. Daniels: (Interposing.) Better have her read that question back.

(The reporter read the previous question.)

A. It would be my guess it was about November 7, but Mr. Lutz, the manager of our department, can give you that information.

Q. (By Mr. Davis.) You continued to sell the inventory of Seagram products that you had on November 1st,

at the prices filed on or about November 1st until some time in February or January, did you not?

A. We did not have any inventory.

72 Q. You mean on the 1st of November, 1946, you were completely out of all Seagram merchandise?

A. May have been an odd brand or two, but I am confident that we had no Seagram Seven Crown for sale in that period.

Q. But you made a price filing nevertheless, although you had none on hand?

A. Yes, expecting to get it. We would have, expecting to get it.

Q. Well, did you?

A. No, we did not get any.

Q. Did you make the filing without any merchandise?

A. As indicated before, when we determine on a policy in our office, I leave the detail alone. I could not possibly follow the detail. Now Mr. Lutz or Mr. Baker, one of the men working in that department, can tell us exactly when we filed and fixed price on Seagram's.

Mr. Davis: I would like to have the reporter read the question and ask that the witness be admonished to answer the question.

(The reporter read the previous question.)

73 A. Do you want me to answer that question?

- Expecting to get the merchandise, having orders on file for a substantial quantity, we very naturally would have filed our price on it. But now, as to testifying that we actually did, I can't tell you what is in our price list without I have a list here in my hand.

Q. (By Mr. Davis.) Mr. Moxley, is the sum and substance of all that speech that you don't know?

A. You mean as to that particular item on that particular day?

Q. Yes.

A. Well, it would have to be.

Q. Well, it would save a lot of time—

A. (Interposing.) Oh, all right.

The Court: I think we could save a lot of time if both sides would get right down to the point that is in issue.

Q. (By Mr. Davis.) Prior to your conversation with General Schwengel at your home, had you attended any meetings or gatherings of liquor dealers in which the
74 question of modifying the fifteen per cent overall mark-up had been discussed?

A. I do not recall at this time.

Q. Do you recall that Seagram distributors in Indianapolis endeavored to reach an agreement with other wholesalers to modify the fifteen per cent markup by taking it only on the new State tax?

A. I participated in no such meetings.

Q. Did you hear of any such proposal?

A. I do not recall.

Q. Did you endeavor with any one other than General Schwengel to procure a resumption of your Seagram shipments?

A. Personally?

Q. Yes.

A. I think I talked to Teece, the Chicago manager, on one occasion.

Q. Did you talk to anyone else?

A. If any of their representatives had come into our office, it would have been quite natural to have said to them, "Come on with our merchandise," but I don't recall talking to any at this time.

75 Q. This is your first lawsuit for Kiefer-Stewart?

A. Yes, sir.

Q. You have come close to some others, haven't you?

A. Oh, yes.

Q. You have threatened some other people to bring suit against them, haven't you?

A. On one or two occasions.

Q. You threatened the Corby people, didn't you?

A. Yes, certainly did. They canceled an order on me after they had taken it in good faith and would not deliver. Do you want the complete answer? We did not have to sue them. They adjusted with us.

Q. You had some controversy with National Distillers, didn't you?

A. Oh, way back there was a misunderstanding.

Q. You threatened to sue them, didn't you?

A. I did not.

The Court: Really, I don't know what in the world that has to do with it.

A. (Continuing.) I think my partner did and they adjusted.

76 Q. (By Mr. Davis.) When you say "partner," that is another representative of the Kiefer-Stewart Company?

A. Yes, sir.

Q. Mr. Moxley, were you present at a meeting of the other wholesale liquor dealers or their representatives the night before General Schwengel was entertained at your house?

A. Not that I recall.

Q. Do you recall whether or not any representative of your company attended such a meeting?

Mr. Daniels: Your Honor, I think we have been over that several times.

The Court: I don't know what it has to do with it. I think we are just taking a lot of time here. You haven't yet shown about the contract.

Mr. Davis: Your Honor, I have reason to believe such a meeting occurred. I want to know if this witness knows about it.

A. I know nothing about it at this time. I know nothing about any meeting the night before Schwengel came.

77 Q. (By Mr. Davis.) Did you have any written distributor's contract with Seagram or any Seagram company?

A. No, sir. We never find written contracts with honorable gentlemen are necessary and rarely use them except where it is to the benefit of the manufacturer in obtaining a line of credit from his banks.

Q. Well, your arrangement with Seagram prior to October, 1946, had no term for bidding either of you to quit when you decided that you didn't want to do business any more, did it?

A. Oh, just an arrangement between gentlemen, "we will take your distribution, we will do you a good job, we will take your merchandise; we will work for you and with you."

Q. Your understanding was it would continue as long as it was mutually satisfactory?

A. That is the general understanding existing with the people whom we represent and we rarely have lost an agency in the forty-five years that I have been there.

Q. You mean that you have rarely ever failed to
78 give satisfaction?

A. We give satisfaction.

Q. And the arrangement that was proposed by Calvert was an arrangement of exactly the same character, was it not?

A. Absolutely. Remember, they had been soliciting us for four years.

Q. I am asking you if it was not of the same character.

A. Yes, same character except a little—would you like that amplified?

Mr. Davis: I am satisfied with it.

A. (Continuing.) Always we were holding off, saying, "When you will give us adequate supplies of liquor, we will make Calvert the No. 1 or 2 seller in Indiana, if you will wake up your brand with good advertising,"—

The Court: Old Common was the other?

The Witness: Oh, by the way, just in passing, may I tell you we distribute more than a million or two million of several accounts not in liquor alone, never had a scratch of a pen, and we have practically never lost an agency.

79 Q. (By Mr. Davis.) Never had any agreement with the other wholesalers? Didn't you?

A. With our competitive wholesalers, no, sir. We will make no horizontal agreement with anybody.

Q. As a matter of fact, before Mr. Schwalb told you that Calvert was not going to ship any merchandise, you had already told them not to ship what they had proposed to ship in November until December?

A. And to be sure and make it not less than the four thousand cases, because we could not afford to put our sales crew on to it without we had enough merchandise to do business with.

Q. So that your nod will get in the record, the answer that you had told them not to ship the November allotment until December—

A. (Interposing.) We had not said not to, we had said, "When you give us enough liquor to do business with in December we will put it on and do you a great job."

Q. You had not told them to refrain from shipping the November allotment?

80 A. No, sir, all of the conversations with Schwalb of the Calvert Company were held by the management of our liquor department and I carry none of those detailed conversations with them.

Q. By that you mean you don't know?

A. Specifically, I presume I should say that, though I was told what the arrangements were.

The Court: That is all.

At three-fifteen o'clock a recess was taken.

81 A. KIEFER MAYER, a witness called on behalf of the Plaintiffs, being first duly sworn, testified as follows:

Direct Examination by Mr. Daniels.

Q. Will you please state your name to the Court and Jury?

A. A. Kiefer Mayer.

Q. Where do you live?

A. Athletic Club.

Q. This city?

A. Indianapolis.

Q. What is your business?

A. Kiefer-Stewart Company.

Q. How long have you been connected with the Kiefer-Stewart Company?

A. Thirty-nine years.

Q. What is your position?

A. Vice-President.

Q. Are you familiar with, in a general way, the operations of the wholesale liquor department of the Kiefer-Stewart Company?

A. Just broadly.

Q. Now, Mr. Mayer, directing your attention to the date of December 5, 1946, I will ask you if you recall a conversation at the Kiefer-Stewart office on that day in which you, Mr. Moxley and General Schwengel, the President of Joseph E. Seagram & Sons participated?

A. Yes, sir.

Q. Will you tell the Jury, in your own language, what the substance of that conversation was and what occurred at that time?

A. Our telephone operator notified me, my office, around ten o'clock, that Mr. Moxley would like me to come in his office and meet General Schwengel.

Q. Had you ever met him before?

A. Never had met the gentleman before. In fact I'd never heard of him until two or three days before, so I walked into Mr. Moxley's office and had the pleasure of meeting the General. Mr. Moxley asked me to sit down with them and they were in a discussion of this subject, following Seagram's price policy and Mr. Moxley had
83 said to the General something about the increased costs

of handling, and that it was not only Seagram that we had to consider but also the other lines, that if we handled other lines on the policy that Seagram wanted, at the same price policy, we would have to handle other lines, and General Schwengel was talking to him about coming along on the price basis.

I turned to the General and I said, "General, I have heard something of the price policy and I am interested in the legality of it. I have heard several versions and I would appreciate your telling me frankly what is your policy, that you want the Kiefer-Stewart to put into effect."

He said, "Well, we feel that it would be a good policy for all Seagram Wholesale liquor distributors to continue the OPA prices and that is what we have asked you to put into effect."

I said, "Well, do you object if we sell at any other price than the OPA price?"

He said, "Yes, we want the OPA price."

I said, "Are you just asking the Kiefer-Stewart
84 Company or the Indiana wholesalers to put that price into effect, or is that a national policy?"

He said, "That is a national policy in the open states."

"Well," I said, "How can Kiefer-Stewart do it legally?"

"I don't know."

I said, "Well, how can you do it legally?"

"I don't know."

"Well," I said, "If we agree with you to sell at OPA prices haven't we made a contract to fix prices?"

"I don't know." He shrugged his shoulders when he answered.

I said, "I know of no law that would permit you to fix a maximum price in the field of distribution except by consignment and consignment is barred under the alcohol laws."

I said, "You can fix a minimum price on your trade product, brand or name, which has been decided by the United States Supreme Court as private property, but here you are talking about maximum prices. Now, how can we
85 do it legally? How can you do it legally? If we agree with you and other wholesalers agree with you that they are going to carry out the OPA prices, why aren't everyone of us in violation of the anti-trust laws?"

"I don't know."

I said, "How are you getting by with it?"

"Well, just getting by."

I said, "Have you discussed with anyone in Washington?"

"No."

I said, "Well, you are certainly familiar with the statements that have been made not only by the members of Congress when the OPA legislation was passed, but also since and you are also familiar with the statements of the Department of Justice where they are going to prosecute any hold-over price agreements from the OPA and you know what happened to some industries when with the NRA with the hold-over prices and I said, my company just got through with an anti-trust case in which we were not guilty which was not anywhere near as bad in price fixing as this, and we are not going into another. I

said, I am fully sympathetic with what you have in mind and I don't consider that we are raising our prices. What we are doing is applying the formula we applied before the war to our total costs, and if all of the industry would do that, there would not be any need for OPA. We are not taking any speculative profit at all and I said, Now I will tell you what I will do: If you will get a statement for us from the Department of Justice, either the anti-trust department or the Attorney-General or anyone in authority, orally, written, telegraphic or any way, that the Kiefer-Stewart would not be violating the anti-trust laws and subject to prosecution under the anti-trust laws, we will put your price policy into effect immediately.

"Mr. Moxley is sitting there. He is the President of our company. Our liquor department is directly under his supervision. I will ask him whether he will confirm that statement or deny it. I wanted him to say it right here in front of you. Mr. Moxley said, 'Absolutely, General,

Kiefer is right. If you will get us a statement to that effect we will put it into effect immediately.'"

I said, "General, there was one other thing, you know you owe us some whiskey."

He said, "We owe you whiskey?"

I said, "Yes. We have stamps in there on allocation, really contract whiskey, been coming for years."

The General said, "You haven't got any, have you?"

I said, "None."

"Now, Moxley, better come along. I am going to tell you you better come along." He said, "General, we haven't any whiskey."

"You haven't got any whiskey, have you? You better come along, Moxley."

I said, "Wait a minute, General, wait a minute. Do you mean to tell me that your counsel is approving you refusing to ship your wholesale distributors that do not adopt your price policy, that you are restraining trade if they won't agree to your price policy?"

He said, "I don't know." He said, "You are not getting any, are you?"

88 I said, "Mr. Moxley says we are not."

At that time I was called out of the office. My secretary came in and said I was wanted on Long Distance telephone. As I left I said, "General, I want to say I think you have the greatest price violation in the United States, to my knowledge, since I have been here. If you will furnish us the evidence from the Department of Justice that we would not be guilty, complying with your instructions or your requests, they will go into effect immediately and have Mr. Moxley's approval."

I walked out of the office.

Q. (By Mr. Daniels.) He stated also you would not get in any Calvert whiskeys?

A. No, Mr. Moxley mentioned Calvert and Seagram. We spoke of our allotment. He did not separate the two.

Q. He did not?

A. He said, "You are not getting whiskey, are you, Moxley?"

Moxley said, "You know you owe us some Seagram and some Calvert. We have the stamps there."

Q. Was any such statement ever furnished to the Kieffer-Stewart Company from the Department of Justice
89 or anybody connected with it?

Mr. Davis: Just a moment, I think I will object to that.

The Court: You never went any further?

The Witness: No, sir. We could not go to the Attorney-General because we could not answer that question.

Mr. Daniels: I think that is a proper question.

The Court: It is not material. I think he made it plain that he did not get it.

Mr. Daniels: That is all.

Cross-Examination by Mr. Paul Davis.

Q. Are you a lawyer?

A. No, sir.

Q. Have you been educated in the law?

A. No, sir, but i have been accused of being a lawyer.

Q. It was your opinion, at the time you talked to the Attorney-General, that for Kiefer-Stewart to have
90 failed to raise its prices would have been a violation of the anti-trust law?

A. Yes, sir, agreeing with Seagram to raise prices. There isn't any law in the country that permits you to fix prices, maximum prices.

Q. Seagram wasn't asking to agree to raise prices.

A. They were asking us to fix a maximum price.

The Court: Which was the same price that other wholesalers were fixing over the country?

The Witness: Yes, sir.

The Court: Doing business with?

The Witness: Yes, sir. That they were requesting other wholesalers to fix.

Q. Were they asking you to raise prices?

A. No, sir.

Q. They were objecting to your raising prices, were they not?

A. Yes, sir.

Q. You did not think that the law would have been violated by your leaving your price postings as they
91 were on the 23rd of October, do you?

A. Yes, sir.

Q. You do?

A. Yes, sir, if that, now, wait a minute. I am not familiar with the price postings. I will have to say I don't know.

Q. Well, you were familiar, from your discussion with General Schwengel on that day, that Kiefer-Stewart had posted new, increased, re-sale prices on Seagram products?

A. No, sir, I was not.

Q. You did not know that?

A. No, sir.

Q. You did not know that all other Seagram distributors had posted new increase prices?

A. No, sir.

Q. You didn't know that they had all done that simultaneously?

A. No, sir.

Q. And you know it now?

A. Yes, sir, what you say.

Q. Well, you have had information from other
92 sources, to that effect, have you not?

A. No, sir.

Q. You knew when General Schwengel was talking to you that no Seagram distributor in Indiana was in any better shape than you were?

A. You mean on prices?

Q. No, I don't mean on prices. I mean on shipments.

A. No, sir, I did not.

Q. You didn't know, from General Schwengel's conversation or otherwise, when you were talking to him, that Seagram had stopped shipment to every Indiana wholesaler?

A. No, sir, I did not.

Q. Then, what was it made you fear that what they were asking you to do would be a combination with other Indiana wholesalers?

A. He was asking us to agree on price with other Indiana wholesalers. The question of shipments between other Indiana wholesalers and ourselves, he never mentioned.

Q. All he was asking you to do was to back up your individual prices to where they were during OPA?

93 A. Right.

Q. He was not asking you to do that in conjunction with anybody else, was he?

A. Well, he mentioned, just all wholesalers in the United States. He spoke of all Seagram wholesalers in the United States.

Q. And that included the other Indiana wholesalers?

A. It had to, yes, sir.

Q. It was your personal opinion that Kiefer-Stewart Company could not adhere to its OPA price filings without violating the anti-trust law?

A. Yes, sir.

Q. And it was your opinion that it would be a restraint of trade for Kiefer-Stewart to lower prices in order to induce Seagram to make shipments?

A. Quote that again. May I have the question?

(The Reporter read the previous question.)

A. No, sir.

Q. That was all that General Schwengel asked you to do, wasn't it?

A. Yes, sir. He did not ask Kiefer-Stewart alone
94 to do it. He told me that.

Q. Yes, he merely told you that that was a thing that they were asking every one of their distributors to do.

A. Yes, sir.

Q. But he did not ask you to make any agreement with those other distributors, did he?

A. No, sir.

The Court: You mean it was the same price that the others were to make?

The Witness: Yes, sir.

Q. Mr. Mayer, were you consulted by Mr. Moxley about the legality of joining with all Indiana wholesalers?

A. No. No, never heard of it.

Q. To make a concerted mark-up in the price of liquor?

A. No, sir.

Q. He did not consult you about that?

A. No, sir.

Mr. Daniels: I object to that. That is assuming a
95 fact that is not in the evidence. I want to move that question be stricken out.

The Court: That is just a statement of counsel.

Mr. Daniels: Yes, certainly has no bearing.

Q. (By Mr. Davis.) Well, was it your opinion that Indiana wholesalers had already violated the law by filing concerted price increases on liquor?

A. I knew nothing about that.

Q. You knew nothing about that?

A. No.

Q. Didn't General Schwengel protest that all of you distributors had ganged up on them?

A. No, sir.

Q. Didn't say a word about that?

A. No, sir.

Mr. Davis: That is all.

Redirect Examination by Mr. Daniels.

Q. Just a clarifying question: Mr. Davis has asked
96 you a lot of questions in legal terminology. Your point to General Schwengel was, in substance, was any agreement that Kiefer-Stewart entered into with Seagram, would be a violation?

A. Right. When it was with competing wholesalers.

The Court: If that price was fixed by the manufacturer and it required all of the wholesalers to adopt that price by which it would ship to any of them, that would be a violation of the law?

The Witness: Yes, sir.

Recross Examination by Mr. Davis.

Q. You made no distinction in your mind as to whether they were asking you to agree to a minimum re-sale price or to a maximum re-sale price?

A. Oh, yes, I did. Oh, yes, I did.

Q. You thought that it was all right to agree to a minimum re-sale price because the anti-trust laws had expressly authorized that?

97 A. No, sir.

Q. No?

A. The anti-trust laws never express that.

Q. What?

A. A minimum re-sale the Supreme Court decision, Judge Sutherland, * * *

(Witness proceeds to make speech which reporter did not take.)

98 I have kept my company out of trouble for some years and even refused to allow them to sign some contracts that were prepared by very able counsel, I understand, in New York, representing the distillers. Some of that caused the trouble in Colorado, and I refuse to let my company sign a contract in the State of Indiana, a fair trade agreement would have caused the same trouble they had down in the State of Florida.

The Court: Mr. Moxley wanted to sign that, did he?

The Witness: Yes, sir, he would sign anything.

Q. (By Mr. Davis.) You do regard yourself as something of an expert?

A. On certain things, I am good.

Q. But you were not consulted about the concerted action of the wholesalers of Indiana?

A. No, sir, I never heard of any concerted action. I never attended the wholesale liquor dealers meeting.

Q. You have heard about it in this court?

99 A. I have heard more about it in this court than I ever heard before.

Mr. Davis: That is all.

Witness excused.

100 Mr. William G. Davis: Your Honor, at this time we would like to introduce, offer in evidence and read a Stipulation offered and entered into which has been marked Plaintiff's Exhibit No. 1.

(Mr. Davis took the stand and read the Stipulation, Plaintiff's Exhibit No. 1, signed by counsel for the parties.)

Mr. William Davis: If your Honor please, I would like to read in evidence Plaintiff's Exhibit No. 2, which is a Stipulation as to the authenticity of certain documents.

(Mr. Davis read the first paragraph of Plaintiff's Exhibit No. 2.)

Mr. Paul Y. Davis: If the Court please, we object to the reference to the documents. They are not, we believe, competent evidence. We don't want them described until they are offered.

Mr. William Davis: We might save a little time by offering two at once, Mr. Davis.

We offer in evidence Plaintiff's Exhibit No. 3,
101 Contract under the Indiana Fair Trade Act between Joseph E. Seagram & Sons, Inc. and Fred A. Beck Company, Inc., dated July 14, 1947.

Mr. Paul Davis: If the Court please, I suggest the Exhibits only be offered in evidence.

Mr. William Davis: Exhibit No. 3 is offered in evidence.

The Court: What is it? I don't know.

Mr. William Davis: It is the copy of the contract.

The Court: I assume that is under your supplemental Bill of Complaint?

Mr. William Davis: No, your Honor, it is not related to that. It is a copy of the Fair Trade contract entered into between Seagram and one of its wholesalers, Beck. That prescribes as the minimum prices, such prices as are posted under the contract. Now, the offer is to show that after shipments were suspended from November till February on the ground that the prices had been increased by
102 thereafter, filed these OPA prices as the minimum prices which could be charged by wholesalers or retailers in Indiana for their products.

Mr. Paul Davis: The defendants and each of them object to the offer of the Exhibit on the ground that it has to do with the transaction subsequent to the alleged wrong charged in the complaint, has no relevancy whatever to support any charge in the complaint, and simply encumbers the record with the collateral issue as to other transactions

with other persons at a time after the plaintiff had ceased to be a distributor of Seagram products, and has no bearing upon either the issue of alleged violation of law or alleged damage.

The Court: Well, the objection is overruled. It may be read in evidence.

(PLAINTIFF'S EXHIBIT NO. 3 was admitted in evidence.)

(Mr. Davis read Paragraph 3 of Plaintiff's Exhibit 2.)

103 Mr. Daniels: Why not save reading, it is the wholesalers fair trade agreement between Seagram and Fred A. Beck.

The Court: If you want to use it in your argument, I don't see the necessity of taking the time to read it.

Mr. William Davis: All right.

Plaintiff next offers in evidence as its Exhibit No. 4 a wholesalers fair trade agreement between Calvert Distillers Corporation and Gary Wine & Liquor Company dated July 24, 1947.

The Court: Something similar to the other?

Mr. Paul Davis. The Defendants and each of them object for the reasons given in the last objection.

The Court: I understand it is similar. Let it be admitted.

(PLAINTIFF'S EXHIBIT NO. 4 was admitted in evidence.)

104 Mr. William Davis: Plaintiff next offers in evidence as its Exhibit No. 5, what is denominated as a price posting under contract subject to Indiana Fair Trade Act by Joseph E. Seagram & Sons, Inc., shown received in the auditing department of the Alcoholic Beverage Commission on April 18, 1947 and effective April 23, 1947. Now, that is a related exhibit to the contract, if your Honor please.

Mr. Paul Davis: The Defendants and each of them object to the offer of the Exhibit for the reasons stated in objecting to the last two offered Exhibits and for the further reason that it represents price posting of prices to which the Plaintiff refused to adhere.

The Court: Well, I think it is competent. I don't know just how much weight it will have when it comes to determine the facts in the case, but I think it is competent to be considered along with the other evidence in determining really what the facts are.

It may be read in evidence.

(PLAINTIFF'S EXHIBIT NO. 5 was admitted in evidence.)

105 Mr. William Davis: Plaintiff next offers in evidence as its Exhibit No. 6, price postings under the Indiana Fair Trade Act of Joseph E. Seagram & Sons, Inc., dated July 20, 1947, effective August 1, 1947.

The Court: Is that similar to this other except the date?

Mr. William Davis: That is right.

Mr. Paul Davis: We object to it.

The Court: Let it be read. You may have an exception.

(PLAINTIFF'S EXHIBIT NO. 6 was admitted in evidence.)

Mr. William Davis: Plaintiff offers in evidence as its Exhibit No. 7, price postings under the Indiana Fair Trade Act of Calvert Distillers Corporation, bearing file mark of November 5th of the Indiana Alcoholic Beverage Commission, of November 5, 1948.

Mr. Paul Davis: Same objection.

The Court: All right. Let it be read.

106 (PLAINTIFF'S EXHIBIT NO. 7 was admitted in evidence.)

Mr. William Davis: Plaintiff offers in evidence as its Exhibit No. 8, a list of the authorized distributors in Indiana of Seagram Distillers Corporation, dated October 30, 1946, shown received in the auditing department of the Alcoholic Beverage Commission on November 1, 1946.

The Court: Any objection to that?

Mr. Paul Davis: I think there is no objection to that, your Honor.

The Court: All right, let it be read.

(PLAINTIFF'S EXHIBIT NO. 8 was admitted in evidence.)

Mr. William Davis: Plaintiff offers in evidence, as its Exhibit No. 9, a list of the authorized dealers in Indiana of Joseph E. Seagram & Sons, Inc., dated July 22, 1947, received July 23, 1947.

Mr. Paul Davis: To this Exhibit the Defendants
107 and each of them object for the reason that it is alleged at a time subsequent to the time referred to in the complaint and has no relevancy.

Mr. William Davis: If your Honor please, the offer is made on the ground that it shows all the other Indiana wholesalers except this plaintiff were named as authorized distributors of Seagram.

Mr. Paul Davis: I withdraw the objection, if that is its purpose.

The Court: All right, let the objection be withdrawn and the Exhibit admitted.

(PLAINTIFF'S EXHIBIT NO. 9 was admitted in evidence.)

Mr. William Davis: Plaintiff offers in evidence, as its Exhibit No. 10, a list of authorized distributors in Indiana of Calvert Distillers Corporation, dated November 13, 1946, shown received in the auditing department of the Indiana Alcoholic Beverage Commission on November 16, 1946.

Mr. Paul Davis: No objection.

108 The Court: Let it be read.

(PLAINTIFF'S EXHIBIT NO. 10 was admitted in evidence.)

Mr. Paul Davis: If the Court please, we have stipulated, subject to objection, and I wish the objection entered to each of the Exhibits be entered to the reading of the remainder of the Stipulation.

Mr. William Davis: I need not read it, your Honor.

Mr. Paul Davis: I would like to have that read. We are going to have to go into that matter and I want the whole story told.

Mr. William Davis: Beginning where we left off—do you want me to read the preliminary?

Mr. Paul Davis: The only part is to stipulate there are other items.

Mr. William Davis: (Reading.) "The parties further stipulate subject to objection as to relevancy and competency, that Seagram Distillers Corporation and
109 Calvert Distillers Corporation Fair Trade contracts, referred to as Items 1 and 2 above, are typical of contracts under the Indiana Fair Trade Act which were effective on or about the above mentioned dates between Seagram Distillers Corporation and all of its Indiana wholesalers and Calvert Distillers Corporation and all of its Indiana wholesalers."

110 WALTER LUTZ, a witness called on behalf of the Plaintiffs, being first duly sworn, testified as follows:

Direct Examination by Mr. William Davis.

Q. Please state your name to the Court and Jury.

A. Walter Lutz.

Q. Where do you live?

A. 148 East Pleasant Run Boulevard, Indianapolis.

Q. What is your business?

A. I am the Vice-President of Kiefer-Stewart Company.

Q. In what capacity do you act?

A. In general charge of the liquor department, particularly the buying.

Q. Mr. Lutz, did you participate in any negotiations with the Calvert Distilling Company, or Calvert Sales with reference to a Calvert distributorship in Indiana for Kiefer-Stewart?

A. As far back as 1942.

Q. Will you relate, briefly, what occurred in 1942?

A. Sometime in the spring of 1942 I was advised 111 by Mr. Moxley that Francis Brightling and Jeff Fields of Calvert were in Indianapolis and wanted to talk to us about a distributorship. We met them in the Severin Hotel. They told us at that time, they were dissatisfied with one of their distributors and they thought they would make a change. Their other distributor had recommended the Kiefer-Stewart Company. However, after talking the matter over pro and con and arguing all the sides of it there was to argue, we decided, at that time not to go along with them and to stay where we were.

Q. Did you have any other negotiations with any of the officials of Calvert or Calvert Sales between that time and the meeting at French Lick on October, in 1946?

A. No, sir.

Q. Were you present at a meeting with Calvert representatives in French Lick?

A. Yes, sir.

Q. Will you state who was present at that discussion?

A. Mr. Moxley, Mr. Baker of our company, Mr. Schwalb, Mr. Olsen, Mr. Gollin of Calvert.

112 Q. What was said at that meeting concerning the Calvert distributorship?

A. Well, Calvert was very anxious—

The Court: (Interposing.) Just tell what was said.

A. Calvert wanted us to take on their distributorship. We wanted to find out from Calvert how much merchandise they could give us. All they could offer us at that time was a thousand cases a month. We could not be interested in Calvert at a thousand cases a month.

Q. Did you so state?

A. Yes, sir, so far as I am concerned that is the way it was left. They said if they could find any more they would contact us later.

Q. Did you have any conversation of it with Mr. Victor Fishel?

A. Mr. Fishel had a conversation with me.

Q. Will you state the substance of that conversation?

A. He met me in the lobby and told me he had heard we had been doing some talking with his cousins, he didn't like it.

113 Q. Can you fix the date of that?

A. It was the next day after this Calvert meeting.

Q. Was that October?

A. The 22nd.

Q. What was your next discussion, if any, with representatives of the Calvert Company, Mr. Lutz? First, state the time and place.

A. On November 5th, which that year was Election Day, Mr. Baker advised me that he had had a telephone call from Mr. Schwalb and Mr. Tarpey, who was then the local Calvert representative that they wanted to see us and we met them in the Marott Hotel.

Q. Who was present at that meeting?

A. Mr. Schwalb, who was the district sales manager in Chicago and Tarpey, Mr. Baker and myself.

Q. Mr. Baker and you for Kiefer-Stewart?

A. Yes, sir.

Q. What was said by the Calvert representatives to you at that meeting?

A. Mr. Schwalb told us that he had been able to procure two thousand cases a month of Calvert merchandise if we would go along with them.

114 Q. What did you say to that?

A. We told them that if they could continually sup-

ply a minimum of two thousand cases a month and could raise that amount within a very short period we thought we could go along.

Q. Was anything said at that meeting by Mr. Schwalb or anyone else present concerning your price change on your products made November 1, 1946?

A. Yes, Mr. Schwalb brought that subject up, wanting to know what was going on down here. Personally I could not tell him of anything that was going on excepting that I knew that we had changed our prices and I asked him what effect that was going to have on Calvert shipments, and he said, "None whatsoever." They wanted to get in the market and this was a swell opportunity.

Q. Was there anything else said at that meeting? Did you have any further meeting, Mr. Lutz, with any representatives of the Calvert Company?

A. Yes, Mr. Schwalb called Mr. Baker on either the 11th or the 12th of November from the Harrison Hotel, wanted us to come up and see him there. Again he 115 was with Mr. Tarpey.

Q. Who was present at that time?

A. Mr. Baker and myself.

Q. What was said at that time by Mr. Schwalb?

A. This time he was down here for two reasons: one reason was, of course, to confirm the two thousand cases a month, the other reason was to organize a sales meeting for our sales force if, as and when the Calvert merchandise came in.

Q. Were any arrangements made for any such meeting?

A. Yes, he had to get on the telephone and call Mr. Gollin in New York because he said some of the New York officials were coming out and we had to find out before we could set a date when they could get here.

Q. Did Mr. Schwalb or Mr. Tarpey indicate what the nature of the meeting was that was to be held?

A. Sure, a sales promotion meeting at which they wanted all of our salesmen in. They wanted to have their executives. They were going to have a luncheon, planned to start off with a big bang.

Q. Did they give you the number or any idea how 116 many people who were to attend this luncheon?

A. Just as the arrangements—

(Objection.)

A. We expected sixty.

Q. Was anything said, Mr. Lutz, at that meeting, concerning prices or mark-ups?

A. Nothing specifically about mark-ups. The subject of the Seagram situation in Indiana was brought up.

Q. What, if anything, did Mr. Schwalb or Mr. Tarpey say at that time?

A. Mr. Tarpey said they were still wanting to go along and we got on the telephone and talked to Gollin about it.

Q. Who talked to Gollin?

A. I talked to Gollin and Baker talked to Gollin.

Q. What did Gollin say to you?

A. Mr. Gollin said the Seagram situation was going to make no difference. He was going to personally guarantee that the merchandise would be out here and for us to go along and make arrangements for the sales meeting.

117 Q. What was Mr. Gollin's capacity with Calvert, if you know, at that time?

A. He was assistant general sales manager under Mr. Reznik.

Q. Now, did you make any arrangements yourself for any luncheon meeting after that meeting at the Harrison Hotel?

A. Yes, sir, personally I called Mr. Watson, the manager of the Severin Hotel and told him that Calverts were going to have a big sales meeting here, they expected to have eight or nine executives. They wanted rooms for that number of people. They expected to have a luncheon meeting and they wanted a public room big enough for sixty people. Mr. Watson told me he did not think he had a room that would take care of them, I had better have one of the Calvert men come down and look at it and satisfy himself. I called Mr. Tarpey and had him look at the room. He decided the room was not big enough and made arrangements other places.

Q. Was that meeting ever held, Mr. Lutz?

A. No, sir.

118 Q. Do you know why it was not held?

A. Yes, sir.

Q. What date was the meeting cancelled?

A. On November 19th, I think it was, Mr. Schwalb called Mr. Moxley.

Q. That is the conversation concerning which Mr. Moxley testified?

A. Yes, sir.

Q. Now, did you attend, Mr. Lutz, the meeting at the Warren Hotel on October 31, 1946?

A. Yes, sir.

Q. Do you recall anything that was said at that meeting? What persons do you recall made any talks or remarks addressed to the meeting?

A. Mr. Moxley, Mr. Hagemier and Mr. Johnston.

Q. Do you recall what Mr. Moxley said?

A. Not particularly, only in a general way. Mr. Moxley was revealing the past history of business, not only the liquor business but all businesses. He was reviewing the period immediately following the First World War. He was telling the people assembled of the pitfalls there was before them, of the increased costs of business, etc., and of our determination to go ahead and change our prices.

Q. He indicated, did he, what changes he proposed to make?

A. Yes, sir.

Q. Do you recall what Mr. Merton Johnston said in the meeting?

A. Only generally. Merton tried to tell the men that the ABC was interested in a more or less stable business, they were not going to stand for any price cutting. They were not going to stand for any under-the-counter deals. They wanted everything open and above-board and he was going to try to make it as easy as possible for everybody to get along with the ABC.

Q. Did he say anything at that meeting about filing letters?

A. Yes, the one thing that I was particularly interested in was the method that he might want to use in that case.

Q. He indicated that, did he?

A. He indicated if anybody wanted to make a change in filing, they could do it with a letter.

120 Q. You sent in such a letter, did you, Mr. Lutz?

A. Yes, sir.

Q. That letter indicated, did it, an overall mark-up of whiskey of 15%?

A. Yes, sir.

Q. What response did you have from the commission?

A. We had a letter from the commission O.K.ing our request.

Q. Did you later file any detailed prices?

A. Personally, I would not know, but I assume that we filed a price list.

Q. Did you use a price list ever with the commission in lieu of a detailed form filing on their forms?

A. 'Before OPA came in, yes.

Q. Do you remember any other person addressing that meeting?

A. No.

Q. Do you recall anything that Mr. Hagemier said?

A. Mr. Hagemier, as I remember it, talked mainly about the legal aspects.

Q. Mr. Lutz, subsequent to the time that Seagram suspended shipments to Kiefer-Stewart, did you have any 121 dealings with Seagram with reference to delivery of the goods due you on allotment?

A. Subsequent to the time? Subsequent to November 1st, or thereabouts?

Q. Subsequent to November 1st, 1946.

A. Not until February, '47.

Q. Now, what was the occasion on February 3, 1947?

A. Well, on February 2nd, which was Sunday, I was phoned at home by Mr. Freeney, of the Mooney-Mueller & Ward Company, and asked if I had received an invitation to come to Chicago to a meeting on Monday at which Mr. Fishel was going to be present.

I told him I had not, but that would not be anything out of the ordinary because those invitations came either to Ed Dietrich or to Mr. Moxley and he hung up. He evidently called Mr. Moxley because in a very few minutes Mr. Moxley called me and told me he thought that the thing for me to do would be to go to Chicago and attend that meeting and meet Mr. Fishel on the theory maybe they had overlooked it or maybe we had not received the telegram or phone call.

Q. Did you go to the meeting?

122 A. Yes. I went to Chicago on the sleeper, got there early in the morning: sometime around ten o'clock I got hold of Mr. Don Grube at the Seagram office, told him I was in town and wanted to see Mr. Fishel. He told me Fishel was there and was going to have a meeting with some of the jobbers, but that he was going only to talk to people who had filed prices, new prices. I told him that so far as I knew we were filing new prices that day, so I knew of no reason why I could not talk to him.

He said, "Come right up to the office," which I did. I arrived there about ten-thirty. Mr. Fishel was very busy. I never got to see him. We went out to lunch at one, and while I sat very close to him at the luncheon table, I never got in any conversation with him until after the luncheon was over. After the lunch, I went around the table and told him I wanted to talk to him as one stockholder in the Seagram Company to another, where did the Kiefer-Stewart Company stand in this situation, inasmuch as he had said at the luncheon that not all of the jobbers were going to be taken back. He told me that 123 he did not know. He had not made up his mind. "We will let you know."

I told Vic that I had to know, that I could not leave Chicago until I found out, and I wanted him to tell me. He said, "You go back to the office and I will come over there and talk to you."

Sam Bernbach drove me back. After we had been in the office a little while he had a telephone call in which he was advised that Mr. Fishel was in his suite at the Drake and was not coming back to the office and he had Don Grube over there with him. I told him to call back there and tell him that I was still waiting. They called back and said they would let me know in five minutes. The five minutes grew to about an hour and I had Sam again remind him that I was still there.

Q. This was at the hotel, was it?

A. No, I am in the Seagram office.

Q. Proceed.

A. They told Sam at that office to have me come to the Drake Hotel at five-thirty and he would talk to me.

I went immediately over and had to wait in the lobby 124 until five-thirty. In the meantime Sam came in. At

five-thirty I called the suite upstairs and Don told me to come up, but when I got up there, Vic was busy, I didn't get to see him. It was sometime probably around six o'clock when he was finally able to talk to me and he took me in a little kitchenette with Sam Bernbach and Don Grube.

Q. They were present?

A. Yes, sir, the four of us.

Q. What was said?

A. When he told me the things he had to say to me, he did not want to say to me; he wanted to say them to

Mr. Moxley. He wanted me also to know that the decisions that were being made were his, that Sam and Don did not have anything to do with them. He called my attention to the fact that he had said that in the afternoon that not all of the jobbers were going to be taken back and he says, "Your house does not fit into the picture."

Q. Did he give you any reason for that?

A. Yes, sir, he told me not because of anything the house had done, but "because Mr. Moxley does not
125 see eye-to-eye with me on policy."

Q. Did he explain that statement?

A. No, sir, except that he said, "This thing all goes back four or five years to the time Mr. Moxley was in New York talking to my cousins and I told him then that I would not be in any house with them. I told you at French Lick" (that is me he is talking to) "that I knew you were talking to my cousins and I don't like it."

Q. To whom did he refer when he used the word, "cousins"?

A. He was referring to the officials of the Calvert Company.

Q. Well, was there anything else said by Mr. Fishel at that time?

A. He dwelt on the subject of the General, said that he thought that Mr. Moxley had not handled the General very well, that he knew about the General being insulted and he had also heard the remarks that were made about the bricks.

Q. Did he say anything to you, Mr. Lutz, concerning the prices of wholesalers?

A. Concerning the what?

126 Q. Concerning the wholesalers' prices.

A. Oh, only in a general way. He said that he thought that if the wholesalers, when they started this affair, had consulted with the suppliers, the thing probably could and would have been all ironed out. He did not think anybody should get into a fight without finding out what the other man thought about it.

Q. Well, did he say anything to you at that time, Mr. Lutz, about furnishing any shipments due Kiefer-Stewart?

A. He sure did.

Q. What did he say?

A. He said in that kitchen, that there was one allocation at Lawrenceburg we could have it if we wanted it.

We could do anything about it that we wanted to; if we wanted it Sam would take care of it.

Q. Did he say anything to you concerning any anticipated litigation with Kiefer-Stewart?

A. He said to me that he thought that Mr. Moxley might sue the Seagram Company over this transaction, he expected it, and he thought that maybe Mr. Moxley might win it. He thought that it might cost Seagram some 127 money. He also said that—Mr. Fishel said, “I am the last word as far as Seagram is concerned. There will be nothing done in this matter until I give the word.”

Q. Does that cover the conversation?

A. Practically so, except that he told me that he wanted to tell these same things to Mr. Moxley. He was on his way to Honolulu. He would be back through Chicago on or about March 6th; when he got back into Chicago he would get hold of Mr. Moxley. He would come to Indianapolis if he could. If he could not, he would have Mr. Moxley come to Chicago.

Q. Did he, as far as you know, ever do that, Mr. Lutz?

A. I never heard of it, Mr. Davis.

Q. Now, in your capacity as a sales manager of the liquor department, you make purchases, do you, Mr. Lutz, of the products of the various distillers?

A. I am not sales manager, I am the buyer.

Q. I am sorry.

A. Yes.

Q. Do you have some experience, then, Mr. Lutz, in connection with the purchasing products with the popularity of brands?

A. Yes, sir.

Q. Will you state first, Mr. Lutz, from your knowledge what the relative popularity at this time is of straight whiskeys compared to spirit blend whiskeys?

A. At this time?

Q. Yes, sir.

A. I can't tell you, Mr. Davis, about the popularity. I can tell you about their sales position. It is very low. That is an economic matter, not a matter of popularity.

Q. Relatively, what are the best blends or straight whiskeys?

A. By far, blends.

Q. State first, did that begin at the time of the war when distillation ceased?

A. The percentages of ryes was accelerated during the war. It had been going on a little before then.

Q. Is that generally true up to the time of this litigation?

A. Yes, sir.

Q. Is there any shortages now of the straight whiskeys?

129 A. There will be shortages of straight whiskeys for a year or more.

Q. Now, on the various types of blended whiskeys, from your experience and your knowledge, what are the most popular blends in the Indiana market?

A. The most popular blends in the Indiana market, Seagram 7 Crown, Calvert Reserve, Schenley Reserve.

Q. Now, which of those products did Kiefer-Stewart have prior to November, 1946?

A. 7 Crown.

Q. You have had contacts, have you not, with the various persons in the Seagram organization in connection with your buying of their products?

A. Up until 1946, yes.

Q. Can you state from your knowledge, what the leading blend of sales were of Seagram products from let's say 1942 to 1947.

A. Generally in that period, 7 Crown.

Q. Now, you handled the Kessler product?

A. Yes, sir, prior to OPA.

Q. Is Kessler now on the market?

A. So far as I know, it is not in Indiana.

Q. When have you last handled it?

130 We have got a small allocation of it, I think, sometime in '46.

Q. Thereafter, what Seagram products did you principally buy?

A. 7 Crown.

Q. Have there been any since February, 1947, Mr. Lutz, have you made any changes in your sales methods in the liquor department, by way of reduction of expenses or warehouse expenses, traveling men and the like?

A. Not that I know of. I think they have been increased. You will have to get that information from somebody else.

Mr. Davis: Your Honor, we may want to recall Mr. Lutz tomorrow for one question to identify one Exhibit of the account. Otherwise that is all.

Cross-Examination by Mr. Davis.

Q. You had not been invited to the meeting of Seagram Distributors in Chicago?

A. No, sir.

Q. How did you happen to go without an invitation?

A. I went to Chicago on the instructions of Mr. Moxley on the theory that we had probably not received the telegram in the proper manner, might have been at the office.

Q. Now, you knew that all of those other distributors had been, their shipments had been suspended, did you not?

A. Prior to that time?

Q. Yes, prior to the time that you went to the meeting at Chicago.

A. No, I did not know that. I had been told that.

Q. You had been told that by whom?

A. Probably by their representative, probably it was gossip on the street.

Q. You had had several meetings with them, had you not, with the Indianapolis wholesale representatives, to discuss the best method of getting Seagram back into your warehouse?

A. Me?

132 Q. Yes.

A. No, sir.

Q. You had not attempted with anyone previously to that time, to induce Seagram's to resume shipments to Kiefer-Stewart?

A. No, sir.

Q. You knew, of course, why your shipments had been suspended, didn't you?

A. Well, I understood why.

Q. Weren't you told why by Mr. Bernbach?

A. I don't remember Mr. Bernbach talking to me. He might have, but I don't remember.

Q. Who first told you that Kiefer-Stewart was not going to get any more Seagram merchandise after November?

A. I don't remember that, Mr. Davis. I don't know.

Q. But you found it out some way?

A. Yes, sir.

Q. Now, when you were at the meeting of November 31st, do I understand you to say that the only people who made speeches or addresses to that entire meeting were Mr. Moxley, Mr. Johnston and Mr. Hagemier?

- 133 A. No, sir, you did not.
Well, in answer to the question as to who spoke there, you gave those three names.
- A. That is right.
- Q. Well, can't you give any other names?
- A. No, sir.
- Q. You don't remember any other speech?
- A. No, sir.
- Q. Do you remember anybody else who told the meeting what his house proposed to do about the new market?
- A. No, sir.
- Q. Did anybody else tell in the meeting?
- A. I can't answer. I don't know.
- Q. Well, what is your best recollection?
- A. I don't know.
- Q. Well, you have a recollection?
- A. No, sir.
- Q. You mean to say that your recollection does not tell you whether anyone else did or whether anyone else did not speak on the subject of the proposed new market?
- A. No, Mr. Davis, it will not.
- Q. Then, equally within your recollection, others
- 134 might not have?
- A. They might have, they might not, I don't know.
- Q. You made some statement with reference to filing of new prices, about having filed a previous to OPA price list.
- Did you mean by that, that you simply put down your various brands and the ultimate price at which you proposed to sell them without showing the detailed calculation, how it was arrived at?
- A. Seemed to me in the early days, we furnished ABC our price list as price list.
- Q. No calculation?
- A. I don't remember any calculations until the time OPA came in.
- Q. Now, at the time of that meeting on October 31st, the usual method of posting prices with the ABC was on the form which I have handed you which has been marked Exhibit 11, is it not?
- A. Yes, sir.
- Q. And that form provides for a detailed break-down of the price, does it not?
- A. Yes, sir.

135 Q. Of each particular item of merchandise that you are filing a price on?

A. That is right.

Q. And that had been customary at least all during OPA?

A. That is right.

Q. And it had been customary by a rule or practice of the commission, that no price would be effective until it had been on file in that manner for five days?

A. That was the understanding.

Q. And it was because prices, new prices, were the subject of discussion at that October 31 meeting that Mr. Johnston told you how to get authority for new prices quickly, wasn't it?

A. Probably was.

Q. And he told you, if I understand it rightly, that you would not have to follow the usual form but you could just write a letter stating how you were going to mark up the general classifications of merchandise.

A. That is right.

Q. Distilled spirits so much?

A. That is right.

136 Q. Cordial so much?

A. That is right.

Q. And wines so much?

A. That is right.

Q. And Kiefer-Stewart did file such a letter with the commission, the very next day, did it not?

A. Yes, sir.

Q. And every other wholesaler in Indiana did likewise?

A. You are asking me that?

Q. I am asking you if you don't know that.

A. No, sir.

Q. Did you ever ascertain that?

A. No, I never tried to.

The Court: I think maybe we had better adjourn and you can call him back in the morning if it won't interfere with your examination. Stand aside.

(The witness was temporarily excused.)

The Court: Now, Ladies and Gentlemen, we are going to adjourn until ten in the morning. Keep in mind
137 that we operate here on Daylight Saving time, if any of you come from places where they don't use that time, and be here ready to begin to continue the trial of this case at ten o'clock. During the time you are separated,

I want to caution you again, not to talk with anyone about the case, permit anyone to talk with you about it or in your presence or hearing, Read nothing that might be in the evening or morning newspapers about it, but decide the case after the evidence has all been submitted tomorrow. It means that you should not talk between or among yourselves during this time about the case. Wait until all the evidence has been submitted and that is time enough for you to discuss the case in and among yourselves. Be back promptly tomorrow at ten o'clock.

Whereupon the Court was Adjourned at 5:05 P.M.

138

Indianapolis, Indiana
Thursday, May 19, 1949
Ten O'Clock A. M.

The Court met pursuant to adjournment and the trial was resumed as follows:

WALTER LUTZ, a witness called on behalf of the Plaintiff, having been previously sworn, resumed the stand and testified further as follows:

Cross-Examination by Mr. Paul Y. Davis (Continued).

Q. You are the same Mr. Lutz who was testifying at the close of the last session of the Court?

A. Yes, sir.

Q. Who was present, Mr. Lutz, on the first occasion of your discussing the Calvert distributorship with representatives of Calvert?

A. In 1942 Mr. Francis Breitling, Mr. Jeff Fields, and Mr. Moxley.

Q. What did they say to you, the representatives of Calvert, at that time, about taking their distributorship?

A. They told us at that time that they were having
139 a little difficulty with a distributor in Indianapolis and they wanted to make a change.

Q. What inducement, if any, did they offer you to take it?

A. No inducement that I know of except their line.

Q. Well, did they offer you any permanent arrangement?

A. No, sir.

Q. Did they propose that you should become a distributor on the basis of a guaranteed quota per month?

A. No, sir.

Q. Well, do you remember what was said on that subject?

A. That is too far back, Mr. Davis. I don't. If you are referring to a guaranteed quota, there wasn't anything said.

Q. Well, what was said, as near as you can remember?

A. I would not remember.

Q. Was there anything said about the probable extent of your sales?

A. No, sir.

Q. Anything said about how much they could furnish you?

A. No, sir.

Q. What was your reason for refusing to take on 140 their distributorship?

A. At that particular time the line did not mean enough to us to just add it to what we had.

Q. What do you mean by that?

A. At that particular date the Calvert line in Indiana did not amount to anything.

Q. Well, do you mean that it was not a good seller?

A. In theory, yes.

Q. When did you next talk to Calvert representatives?

A. In 1946.

Q. About what date?

A. The 21st of October.

Q. How do you fix that date?

A. Because it was at a meeting at French Lick, Indiana, of the Indiana Wholesale Liquor Dealers Association.

Q. What else occurred at that meeting of the Wholesale Liquor Dealers Association that you remember?

A. There was a dinner.

Q. Have any discussion with any other wholesalers there about prices after OPA?

A. No, sir.

Q. Any discussion about the chaotic condition of 141 the business?

A. No, sir.

Q. Any discussion with any other wholesaler at all?

A. No, sir.

Q. Didn't have any relations with any of the other mem-

bers or members' representatives that had come down there to attend that meeting?

A. We had social relations, no business relations.

Q. In the course of social relations, you did not discuss prices?

A. No, sir.

Q. What do you remember that Mr. Schwalb and Mr. Olsen and Mr. Gollin, or any of them, said to you about the Calvert line?

A. They were very anxious at that time for us to take on the Calvert line.

Q. Well, who said that, which one of the three?

A. Mr. Gollin might have said it, Mr. Schwalb might have said it—maybe both of them did.

Q. I am asking you what you remember.

A. I don't remember which one.

Q. You don't remember any specific words that were said?

142 A. No, I can only tell you generally.

Q. But generally, you do remember that some one or other of those three men wanted and asked that Kiefer-Stewart become distributors for the Calvert products?

A. Yes, sir.

Q. What, if anything, did you or Mr. Moxley say to that?

A. We could not go along with them on the quantities that they were offering.

Q. Well, now, then you remember anything having been said about quantities?

A. Yes, sir.

Q. What was that?

A. They offered us one thousand cases a month.

Q. Did they offer you any guarantee that you would have a thousand cases a month?

A. No, sir, it was in their words.

Q. Did you have any understanding that you were to have that much for any definite period?

A. No, sir.

Q. Did you propose to agree to engage as a Calvert distributor for any definite period?

A. Not on a thousand cases a month.

143 Q. Did you propose that you would engage on any basis?

A. No, sir.

Q. Well, when was your next meeting with the Calvert people on that subject?

A. On November 5th, in the Marott Hotel.

Q. How was that meeting arranged?

A. Mr. Schwalb called Mr. Baker on the phone.

Q. And what did Mr. Baker do?

A. Mr. Baker agreed that we would meet them at the Marott Hotel.

Q. Who met them there?

A. Mr. Baker and I.

Q. Mr. Moxley present?

A. No, sir.

Q. How long did that meeting at the Marott Hotel last?

A. Probably forty-five minutes or an hour.

Q. Well, which was it, twenty-five minutes or an hour?

A. I could not—

Mr. Daniels: (Interposing.) Forty-five.

The Witness: Forty-five.

Q. (By Mr. Davis.) What did Mr. Schwalb say 144 on that occasion?

A. That he had located enough whiskey to give us two thousand cases a month if we would be interested.

Q. What did you yourself say to that?

A. I told him that I thought that we would be interested if we could get two thousand cases a month and more.

Q. He did not propose to guarantee you that for any definite length of time, did he?

A. Mr. Schwalb stated that he was sure that he could now get us two thousand cases a month and he was sure that he would be able to find enough merchandise to increase that.

Q. Did you agree to act as their distributor for any definite period of time?

A. No, sir.

Q. The arrangement that he was proposing was an arrangement that either one of you could terminate when you got tired of it, wasn't it?

A. All arrangements are like that.

Q. Well, that was like that, wasn't it?

A. Yes, sir.

Q. Do you remember anything else that was said 145 on that occasion?

A. Mr. Schwalb wanted to know what was going on in Indiana regarding the Seagram position.

Q. That was on November 5th?

A. Yes, sir.

Q. He asked you what was going on in Indiana regarding Seagram's position?

A. Yes, sir.

Q. What did you tell him?

A. If my memory serves me correctly, I told him that I could not tell him very much at that time except that we had a new price list out the next day.

Q. Wasn't there anything said about other Seagram distributors having new price lists out?

A. No, sir.

Q. Was there anything said about the telegram that Seagram had sent out?

A. Seagram had not sent out a telegram.

Q. What did you yourself know about the so-called Seagram situation at that time?

A. Nothing except rumors.

Q. Well, what were rumors?

146 A. That Seagram was not shipping Indiana jobbers.

Q. Do you remember anybody who told you that?

A. No, sir.

Q. On November 5th?

A. No, sir.

Q. Do you recall now anyone to whom Seagram had refused to ship on November 5th?

A. No, sir.

Q. But you do recall that there was then a rumor that Seagram was not shipping to Indiana jobbers?

A. Yes, sir.

Q. But you haven't any idea where you heard it?

A. No, sir.

Q. Now, what happened on the 11th or 12th?

A. Mr. Schwalb phoned Mr. Baker from the Harrison Hotel and asked him to come up there and see him.

Q. How do you fix that date?

A. Because it was either the Monday or Tuesday immediately following the date at the Marott Hotel.

Q. Did anything else happen on the 12th to fix that date in your mind?

A. Not that I know of.

147 Q. Did you attend a meeting of a group of wholesale liquor dealers at the Indianapolis Athletic Club on the 12th?

A. Not that I know of.

Q. What conversation did you have with Mr. Schwalb on the 12th?

A. Well, Mr. Schwalb told us at that time that everything was ready, they had two thousand cases a month, they probably would have more. He was down here to make arrangements for a sales meeting. I was to get stamps to Louisville for the first allocation and send stamps to Louisville for a second allocation, so there would be plenty of merchandise for our men to start work on.

Q. Had you been informed at that time that Seagram's were suspending shipments to Kiefer-Stewart?

A. I would say so.

Q. Well, who so informed you?

A. I could not tell you that. I don't remember that.

Q. Had you any conversation or discussion with any representative of the Seagram Company on that subject?

A. Not that I remember.

Q. You don't remember talking to Mr. Bernbach about that?

148 A. No, sir.

Q. Mr. Teece?

A. No, sir.

Q. All you know is that you somehow or other had learned at that time that Seagram's was suspending shipments?

A. Yes, sir.

Q. Don't you remember that Mr. Bernbach called you and told you that?

A. No, sir.

Q. You know nothing about any meeting that was held on that day by a group within the association to determine what their policy would be because of Seagram's suspension of shipments?

A. I remember no such meeting that day.

Q. Did you at any time ever meet with representatives of other wholesalers to discuss the Seagram suspension of shipments?

A. Not that I remember.

Q. Now, was it on that occasion that you arranged to have a sales meeting?

A. Yes, sir.

Q. And you do remember that?

149 A. Yes, sir.

Q. And you remember what was said on that subject?

A. Mr. Schwab told us that he wanted to have a sales meeting, he wanted to have all of our salesmen in, and he wanted to get in touch with New York because some of the New York people were coming out.

Q. And you were advised sometime after that that Calvert was not going to ship. Is that right?

A. Yes, sir.

Q. When was that?

A. I think that was the 19th.

Q. Did you attend the meeting, or any meeting of the Wholesale Liquor Dealers Association in the early part of December?

A. It seems to me that I did, but I did not attend a meeting. I went to a luncheon and left immediately after the luncheon was over.

Q. Where was the luncheon?

A. Athletic Club, I think.

Q. That meeting was called to discuss the price situation, was it not?

A. I don't know. I was just asked to a lunch.

150 Q. Who asked you?

A. Mr. Moxley.

Q. Did Mr. Moxley attend?

A. I presume so. I don't remember.

Q. You don't remember anything that happened there?

A. No, sir, I only lunched there.

Q. Well, wasn't there any discussion during the luncheon?

A. No, sir, not that I remember.

Q. You don't remember anything that the dealers discussed at that meeting?

A. I heard no discussion.

Q. In the meantime Kiefer-Stewart was observing its new price schedule?

A. Yes, sir.

Q. Did you have any merchandise previously received from Seagram's that you were selling under that new price schedule?

A. If there was any left, we did, yes.

Q. Well, what is your recollection as to whether you did.

A. I don't remember, but we probably did have.

151 Q. Do you remember whether or not all of your previous shipments had been exhausted by the month of January?

A. I know of no reason why they should not have, but I have not looked up the records.

Q. You have no independent recollection?

A. No, sir.

Q. Now will you explain what was the occasion of your going to Chicago to the meeting of Seagram representatives with Mr. Fischel and Mr. Teece?

A. I was instructed by Mr. Moxley to go.

Q. Did he give you any instructions as to what you were to do?

A. No, sir, except to go to the luncheon.

Q. Well, you had a purpose in going up there, didn't you?

A. The only purpose we had that I know of was to go because other jobbers were being invited and we thought that we had missed our telegram by not being at the office.

Q. Well, what did you think the other jobbers had been invited for?

A. There was only one that I knew that had been invited.

Q. Well, Mr. Lutz, you had some objective in going to that meeting other than to get a meal, hadn't you?

152 A. Only to know what was going on, that was all.

Q. Specifically, you wanted to know if Seagram was going to resume shipments to you, didn't you?

A. Not particularly to us, no.

Q. What do you mean, not particularly to you?

A. I just wanted to know what was going on in the Seagram picture, that was all.

Q. What important thing was there in the Seagram picture that you wanted to know about?

A. Resumption of shipments.

Q. So that is what you went there for, is it not?

A. Not particularly to us.

Q. Well, what made you think that that meeting had anything to do with the resumption of shipments?

A. Nothing except what I was told by a party who told me that he had an invitation.

Q. Who was that?

A. Mr. Freaney of Mooney-Mueller-Ward.

Q. What did he tell you?

A. He told me he had an invitation to a meeting in Chicago with Mr. Fischel and wanted to know if we had one.

153 Q. Had anything happened shortly prior to that meeting that made you think that Seagram was going to resume shipments to any jobbers?

A. Nothing except the fact that on the Saturday before, Mr. Moxley had told us that we were going to go back to the OPA scale of prices.

Q. And you had made a filing of the old OPA scale of prices, had you not?

A. At that time?

Q. Yes.

A. No, sir.

Q. When did you make that filing?

A. There had been a letter sent to the ABC either on the 31st of October or the 1st of November advising them that we were—

Mr. Davis: Will you read the question?

(The reporter read the previous question.)

A. This is of February 3rd, is it?

Q. (By Mr. Davis.) Will you fix the date?

154 Mr. Daniels: February 3rd.

Q. (By Mr. Davis.) You mean that Kiefer-Stewart filed new prices on February 3rd, 1947, reinstating the old OPA scale?

A. I don't know. I was not in Indianapolis. I can't tell you.

Q. Well, Mr. Lutz, where were you?

A. I was in Chicago.

Q. Well, now, I am asking you if you don't know that prior to this visit to Chicago on February 3rd Kiefer-Stewart had filed new prices, going back to the old OPA scale.

A. No, sir, I don't know that.

Q. You knew that other Seagram distributors had filed new prices prior to that meeting in Chicago, didn't you?

A. No, sir.

Q. Well, what was it that Mr. Moxley had told you about new prices?

A. Nothing except that we were going back to the old OPA prices.

155 Q. When did he tell you that?

A. On Saturday, at noon.

Q. Well, Saturday, what month and year?

A. February 1st, 1947.

Q. You don't recall now when those prices were filed?

A. No, sir.

Q. You don't recall now when they became effective?

A. No, sir.

Q. You have such records in your files?

A. I would not say as to that. I don't know.

Q. Now isn't it a fact, Mr. Lutz, that when you went to Chicago you knew that not only Mooney-Mueller-Ward, but all other Seagram distributors in Indiana, that is, those to whom Seagram had been shipping prior to the price rise, had filed new prices effective February 3rd of that year?

A. No, sir.

Q. Never heard of it?

A. No, sir.

Q. You don't know now that that happened?

A. No, sir.

Q. Well, what reason had you to think, then, that 156 Seagram had changed its attitude and was going to ship to you although you were still holding the price up?

A. Will you state that question again?

(The reporter read the previous question.)

A. We were not holding the price up. Mr. Moxley had told me on Saturday that we were going back to the old price.

Q. That is all you know about it?

A. Yes, sir.

Q. You did not make any price filing?

A. No, sir.

Q. No new price filing had been made under your instructions?

A. No, sir.

Q. You did not know that anybody else, any other wholesaler, had made a new price filing?

A. No, sir.

Q. But because Mr. Moxley told you you were going back, you went to Chicago to see if you could not get back too?

157 A. No, I went to Chicago because Mr. Moxley told me on Sunday to go.

Q. You went to Chicago on behalf of Kiefer-Stewart?

A. Yes, sir.

Q. And with the purpose on behalf of Kiefer-Stewart to get Seagram's to resume shipments to you?

A. I would not think that could be answered yes.

Q. Well, what was the answer?

A. To find out what Seagram was going to do.

Q. Mr. Lutz, what is your recollection as to the October 31st meeting of the Wholesale Dealers Association before the new prices were filed?

A. Very little.

Q. Do you remember what other wholesalers were represented there?

A. No, sir.

Q. Do you remember any other wholesaler that was represented there?

A. Outside of the people that I mentioned yesterday, I can name only one man, and that man and I were in a personal conversation of our own. That is the only reason I can remember him.

158 Q. Who is that man?

A. Mr. Burris, of Midstate Liquors.

Q. You remember nothing that was said at that meeting?

A. No, sir.

Q. Do you remember any wholesaler present who made a statement as to what his price was going to be?

A. No, sir.

Q. Do you remember any wholesaler present who discussed anything other than the new prices?

A. No, sir, nor the new prices.

Q. All you remember is Mr. Moxley's speech and Mr. Merton Johnston's speech?

A. Yes, sir.

Q. You did know before you went there that the purpose of that meeting was to discuss those new prices?

A. No, sir, all I knew about it is that Mr. Moxley was going to talk about an increased markup.

Q. Well, who takes care of the Kiefer-Stewart filings with the ABC?

A. Mrs. Cotter does the actual work. Mr. Diedrich usually looks after that, under my supervision.

Q. Under your supervision?

159 A. Yes, sir.

Q. Was that true in November of 1946?

A. Yes, sir.

Q. Was that true in January, 1947?

A. Yes, sir.

Q. It was under your supervision that the letter was written which announced that you were going to take a fifteen per cent overall markup beginning November 6, was it not?

A. Yes, sir.

Q. Was it under your supervision that you went back to the OPA prices on Seagram products in January?

A. It probably could be blamed on me, but I was not there, and that was in February, not January.

Q. Well, you mean that you made your filing in February?

A. I don't say that we made a filing. I don't know. I have never looked.

Q. Well, don't you remember going back to the old OPA prices?

A. Yes, sir.

Q. Do you remember making filings on your other merchandise to go back to the old OPA prices? Don't you?

160 A. No, sir.

Q. You don't?

A. No, sir.

Q. You did?

A. We made filings?

Q. Didn't you?

A. I don't know.

Q. Well, you mean, Mr. Lutz, that you don't remember whether or not you abandoned the fifteen per cent overall markup and went back to a markup less?

A. Yes, I remember that.

Q. When did you do that?

A. On February 3rd, I presume. I was not there, but that was the date we were going to.

Q. That was the date your new prices were to become effective, wasn't it?

A. Yes, sir.

Q. To become effective on February 3rd, they had to be filed at a prior date, didn't they?

A. Not necessarily.

Q. What is your recollection as to whether they were filed on a date prior to February 3rd?

161 A. They were not, they could not have been.

Q. Why?

A. Because Mr. Moxley told me on Saturday at noon on the 1st that we were going back. The ABC is closed then and it is closed on Sunday and they could not have been filed.

Q. So you are positive that Kiefer-Stewart made no new filing—no filing of new prices effective February 3rd prior to February 3rd, 1947?

A. Yes, sir.

Mr. Davis: That is all.

Redirect Examination by Mr. William Davis.

Q. Mr. Lutz, you went to Chicago on February 2nd with Mr. Freeney?

A. Why, I understood he was on the train. I did not go with him.

Q. Well, did you see Mr. Freeney before the luncheon meeting that you referred to?

A. Yes, as we were getting off the train.

Q. Did you ascertain from him whether or not 162 Mooney-Mueller-Ward had filed any price change at that time?

A. He told me they were being filed that morning.

Q. Mr. Lutz, I have handed you Plaintiff's Exhibit No. 5, which is entitled "Price Postings of Joseph E. Seagram & Sons," filed April 18, 1947, and have also handed to you Exhibit No. 11, being a Price Posting of Kiefer-Stewart Company bearing a file mark of January 31st, 1946 and covering Seagram products. Now I will ask you with reference to Exhibit 11, how long Kiefer-Stewart maintained in force the prices on Seagram products that are referred to there.

A. Until November 6th.

Q. That was when you filed the letter with the Commission, is that correct?

A. Yes, sir.

Q. Now I will ask you whether those prices on Exhibit No. 11, your Seagram prices, are those which Seagram had in force during that period until November.

Mr. Paul Y. Davis: Just a moment. I think I will object to the question. There is no evidence that Seagram had in force any prices during that period.

163 The Court: When was it this was filed?

Q. (By Mr. William Davis.) Was that Seagram's price to the wholesalers, Mr. Lutz, during the period from January to November?

A. On Exhibit No. 11?

Q. Yes.

A. The price to the wholesaler was the sum of the figure in the f.o.b. distillery column plus the 1944 Federal tax increase.

Q. Now if Seagram had filed any price change, you would have had to refile that exhibit. Is that right?

A. Yes, sir.

Q. Now, I will ask you, by comparison of that exhibit with Exhibit No. 5, whether you can determine whether the wholesale prices which are contained in the posting of Joseph E. Seagram & Sons on April 18th, 1947, was identical with the wholesale prices set out in Exhibit No. 11.

Mr. Paul Y. Davis: Just a moment. To which the defendants, and each of them, object for the reason that the 164 exhibits will speak for themselves.

The Court: I think the exhibits will speak for themselves.

Mr. Daniels: It is a matter of a little calculation, your Honor. The witness is an expert and can do it more quickly than the ordinary person.

The Court: The jury is not an ordinary person.

Mr. Daniels: Of course, they can figure it. It shows it is identical.

Mr. Paul Y. Davis: You want to prove they were identical?

Mr. William Davis: Yes.

Mr. Paul Y. Davis: We admit it.

The Court: Is that all?

Recross Examination by Mr. Paul Y. Davis.

Q. You kept those prices to the retailer shown on Exhibit 11 in force until you made a new filing in November of 1946, is that right?

165 A. Yes, sir.

Q. You made that new filing immediately following the meeting of the wholesalers in the Hotel Warren on the 31st of October?

A. On the 31st of October, I think.

Q. You mean you made a new filing on the 31st?

A. No, sir, we wrote the letter.

Q. You would not have written that letter and changed that markup without knowing that all your competitors were going to do the same thing, would you?

A. I made the change on Mr. Moxley's orders. I don't know anything about the competitors.

Q. Well, you didn't know from that price until you found out your competitors had come down, did you?

A. I don't know about that. Mr. Moxley told me what we were going to do.

Q. Didn't he tell you what your competitors were doing?

A. No, sir.

Q. Didn't he tell you that November 1st, 1946?

A. No, sir.

Q. Didn't tell you that in January or February, 1947?

A. No, sir.

166 Q. He alone determined to change the price?

A. No, we had had a talk about that way back in July, 1946.

Q. But he didn't give you any information about other people?

A. No, sir.

Q. And you yourself don't know what he knew about them?

A. No, sir.

(Witness excused)

167 WALTER BAKER, a witness called on behalf of the Plaintiff, being first duly sworn to testify the truth, the whole truth, and nothing but the truth, relating to said cause, deposes and says:

Direct Examination by William G. Davis, Esq.

Q. Please state your name to the Court and Jury.

A. Walter Baker.

Q. Where do you live, Mr. Baker?

A. 320 East Maple Road, Indianapolis.

Q. What is your business?

A. Sales Manager of the Kiefer-Stewart liquor department.

Q. How long have you been in the liquor department of Kiefer-Stewart?

A. Eight years.

Q. In your capacity as sales manager what are your duties?

A. Supervising of sales of forty-two salesmen, together with traveling with them on the road contacting retailers.

Q. Now, I direct your attention, Mr. Baker, to any nego-

tiations you had with representatives of the Calvert Company with reference to a distributorship, and I will ask you when you first had any conversation with Calvert representatives on that subject?

A. 1943, twice or three times. Twice Mr. Breitling came to our office and talked to me about taking on Calvert. There was nothing done due to the fact that he could not give us adequate merchandise.

The Court: You were handling Seagrams?

The Witness: Yes.

The Court: And Seagrams took over Calvert when?

The Witness: Well, it was back long before then, Judge.

The Court: Long before that?

The Witness: Oh yes.

Mr. Daniels: That depends, Your Honor, what you mean by "taking over." The actual acquiring of the stock came in '45.

Mr. Paul Y. Davis: That actually means what you mean by Seagrams.

Mr. Daniels: If you mean the Canadian Corporation, it's been that way always. If you mean the actual Seagram Company taking over Calvert, it was in April of '45.

Q. Did Mr. Breitling mention any amount of Calvert products that he could offer you?

A. I believe on his first trip he offered us 180 cases per month, which we turned down because it was inadequate for taking on a line at that time.

Q. Did you have any further conversations with Mr. Breitling?

A. I had luncheon with Mr. Breitling later than that in Chicago.

Q. Did anything transpire there with reference to distributorship?

A. No, sir.

Q. When was the next occasion on which you had any negotiations with Calvert representatives?

A. 1946 at the French Lick meeting of the Indiana Wholesalers' Association.

Q. Will you state the occasion for the calling of that meeting?

A. Mr. Olsen, who was then State manager for Calvert, came to me and said his principals were going to be there on Monday and would like to talk to the executives of my company in reference to taking on Calvert. I called Mr. Lutz and he and Mr. Moxley came down to French

Lick. We had our meeting on Monday, I believe it was, October 21.

Q. Who was present at that meeting?

A. Mr. Moxley, Mr. Lutz and myself, together with Mr. Gollin, Mr. Olsen and Mr. Schwalb.

Q. What occurred at that meeting?

A. They offered us at that time 1,000 cases per month, which we turned down due to the fact that we could not go out and promote a line at 1,000 cases per month at that time, and that is what they needed was promotion in Indiana.

Q. Did you so state to them?

A. Yes, sir.

Q. Was there anything said by the Calvert representatives about getting any additional—

A. (Interposing.) They told us at that time they would try to get us at least 2,000 and maybe 3,000. We insisted at that time that we'd have to have two or three thousand cases permanently per month in order to go out and do a job, with the understanding that they would increase 171 that two or three thousand just as soon as possible.

Q. Did anything else occur at that meeting that you recall?

A. No, sir.

Q. If not, what was the next meeting you held with the Calvert representatives?

A. On about November 5th at the Marott Hotel.

Q. Who was present?

A. Mr. Schwalb and Mr. Tarpey of Calvert, Mr. Lutz and myself.

Q. What was said by the Calvert representatives at that time?

A. At that time they were ready to offer us 2,000 cases per month, with the understanding that they would increase it substantially just as soon as possible.

Q. Was anything said at that meeting about Seagram's policy, and if so, state what it was.

A. Mr. Schwalb made this statement at that meeting: He said that regardless of what Seagrams did in Indiana that Calvert was going through with this order with Kiefer-Stewart due to the fact that they wanted to get in this market in a big way and this was their opportunity.

172 Q. Now who introduced that subject with reference to Seagram?

A. I think it was voluntary.

Q. Was it by Mr. Schwalb or by you?

A. By Mr. Schwalb.

Q. What was the next occasion on which you met with the Calvert representatives?

A. On or about March 11 at the Harrison Hotel—November 11.

Q. May I go back just one moment, Mr. Baker. At your meeting at the Marott did you indicate to Calvert whether you would go along with them on 2,000 cases?

A. Yes, if they would give us the 2,000 immediately per month with the promise of additional whisky just as soon as it were possible.

Q. Then at the Harrison Hotel meeting on November 11th what statements were made by the Calvert representatives with reference first to quantity?

A. It was practically the same conversation we had at the Marott Hotel.

Q. Did they make any definite promises on the number of cases?

A. They at that time definitely promised us 2,000 cases per month and also stated that they thought they could get us the additional thousand to bring it up to three thousand.

Q. Mr. Lutz testified as to a telephone conversation with Mr. Gollin. Did you talk to Mr. Gollin?

A. I did.

Q. And upon what subject was that discussion?

A. In reference to holding a sales meeting.

Q. When was that meeting to be held?

A. It was to be held November 23.

Q. For what persons?

A. For our sales force and their personnel from New York. I believe he said at that time there would be nine of them, and before I talked to him he had asked Mr. Lutz to make hotel reservations for those nine people as well as get a banquet room large enough to accommodate our sales force and their personnel.

Q. Were you present at the Warren Hotel on October 31, 1946?

A. No, sir.

Q. Now, Mr. Baker, are you familiar with the expression of "door openers" or "sale leaders" in the whisky business?

A. Yes, sir.

Q. Could you name three principal sale leaders in Indiana from 1946 to date?

174 A. 7 Crown, Schenley Reserve and Calvert.

Q. Has Kiefer-Stewart had any of those lines since November, 1946?

A. No, sir.

Q. And what is the effect, Mr. Baker, from your experience as sales manager on the sale of your other lines if you had no such door openers?

A. Well, we find that retailers, in order to build up quantity orders for shipment, are ordering merchandise that we carry from Seagram distributors in order to build up a quantity order for that distributor, and it has greatly affected our volume.

Mr. William Davis: Cross-examine.

Cross-Examination by Paul Y. Davis.

Q. Mr. Baker, is it your recollection that you made no definite arrangement of any kind with Calvert down at French Lick?

A. Yes, sir, we made no definite arrangement as far as I know at French Lick.

Q. Well, were you there?

175 A. Yes, sir.

Q. And it is your recollection that it was not until November 5th at Indianapolis that you arranged to take on such of the Calvert lines they were able to send you?

A. I don't believe it was definite until November 11.

Q. Does that letter refresh your recollection any on that subject? (Indicating.)

A. I have never seen this letter before, Mr. Davis.

Q. You recognize it as a photostat, and the signature there photostated, don't you, and the letterhead?

A. Yes. I have never seen the letter before.

Q. Well, does that circumstance refresh your recollection any that is mentioned in that letter?

Mr. Daniels: May we see the letter?

Mr. William Davis: Do you have a copy for us?

Mr. Paul Y. Davis: No, I haven't. I showed it to you once before.

Mr. Daniels: When?

Mr. Paul Y. Davis: At the time of taking the examination.

176 A. No, sir, it does not.

Q. Don't you know it to be a fact, Mr. Baker, that on October 31 Calvert sent you an allotment notice?

A. I know nothing about that, Mr. Davis.

Q. And that Kiefer-Stewart replied that they didn't want that in November, that they'd have to wait until December?

A. No, sir, I know nothing about that.

Q. Now, Kiefer-Stewart didn't at any time undertake to sell Calvert products for any definite period or any definite amount, did they?

A. We didn't undertake to sell it because we didn't have it to sell.

Q. Well, did you undertake to sell it conditionally upon your getting it?

A. That would have been decided at the sales meeting, I believe.

Q. What is it?

A. That would have been decided on November 23 after we had the stock in the warehouse.

Q. Well, Mr. Baker, neither Kiefer-Stewart nor Calvert proposed a definite arrangement for a definite amount 177 for a definite term, did they?

A. That I don't recall.

Q. You don't recall?

A. No, I don't.

Q. Well, did anybody agree that you were going to be a permanent Calvert distributor?

A. We wouldn't take on a line unless we had that understanding.

Q. Well, I am asking you if anybody agreed to that?

A. That I can't answer.

The Court: When was it you took on the Calvert line?

The Witness: We never got it.

Q. Well, the arrangement you proposed was that you should become a Calvert distributor under an arrangement that either one of you could terminate whenever it was unsatisfactory?

A. If the shipment had been made that arrangement would have been indefinite—we would have been a Calvert distributor indefinitely.

Q. Until Calvert decided that you shouldn't be any 178 longer, isn't that right?

A. That I can't say.

Q. Did you agree that you would handle—

A. (Interposing.) Did I? No, sir.

Q. Well, did anybody on behalf of Kiefer-Stewart in your presence agree—

A. (Interposing.) No, sir.

Q. (Continuing.) —to be a Calvert distributor for any amount for any given time?

A. No, sir.

Q. Well, what did you mean when you said a permanent arrangement awhile ago?

Mr. Daniels: If the Court please, I am going to object to that question. I think the testimony has been that in trade arrangements between the distiller and the wholesaler if they do a satisfactory business they go ahead. But there is no claim here that there was an obligation on the part of either party in the form of continuing indefinitely or permanently. It is a question of the word "permanently", and as Mr. Davis has construed it and the witness, we are not contending there was any contract whereby it was a permanent arrangement. It was merely the custom of the trade whereby they kept the line if they found it satisfactory.

Mr. Paul Y. Davis: If the Court please, the witness used the word "permanent". On account of counsel's statement, I am no longer interested.

Mr. Daniels: That is not an issue in this case.

Q. What was said on November 5th about Seagram suspending shipments?

A. The only thing I can tell you that was said on that date was a remark that Mr. Schwalb made that regardless of what Seagram did in this market they were going through with their proposed proposition with us because they wanted to get in this market in a big way. I do not remember anything being said about Seagram discontinuing shipments.

Q. Well, what provoked that remark from Mr. Schwalb?

A. That I don't know, Mr. Davis.

180 Q. What did either you or Mr. Lutz say on that subject?

A. As I remember, nothing.

Q. Now, don't you recall, Mr. Baker, that Seagram hadn't suspended anybody's shipments on November 5th?

A. I didn't say they had. I didn't know anything about their having or not having discontinued shipments, nor did I say that.

Q. Had you seen the telegram that they sent to their distributors on that date?

A. No, sir.

Q. And you don't recall anything else that was said at

that time on the subject of Seagram or Seagram's attitude toward the new prices?

A. No, sir, I do not.

Q. But you think that on November 5th Mr. Schwalb said that, "Regardless of what Seagram does, we are going ahead with it."

A. Yes, sir.

Q. Mr. Baker, at that time nobody had even suggested that Seagram was going to do anything about it, had they?

A. That I can't answer.

Q. Did you discuss your new prices with Mr. Schwalb?

A. No, sir.

181 Q. Did you tell him that you had gone up to a larger mark-up?

A. As I remember, no.

Q. Did he say anything about it?

A. Not to my recollection.

Q. What did you think he meant when he said that regardless of what Seagrams did in this market they were going ahead?

A. Well, the only thing I could surmise that some times they might have been stopped by the Seagram Company from doing certain things. That's the only alternative I had. I knew nothing about what he had in mind.

Q. But you remember that he made that statement?

A. Yes, sir, I do.

Q. Now, wasn't that made at a later date?

A. No, sir.

Q. You are sales manager at Kiefer-Stewart?

A. Yes, sir.

Q. You couldn't have sold this Calvert line in competition with other lines, similar lines, could you, at a substantially higher price per case?

A. At that time I would said yes.

182 Q. You could? And you could have sold it in competition with similar brands selling at the old OPA price?

A. Are you talking about what month now?

Q. Beg pardon?

A. What month?

Q. November.

A. No, not in November because OPA had gone off.

Q. Well, OPA's going off didn't automatically raise anybody's price, did it?

A. That is true.

Q. What?

A. In November?

Mr. Daniels: May I ask that that question be read?

(The Notary read the preceding question, as follows: "Well, OPA's going off didn't automatically raise anybody's price, did it?")

Mr. Daniels: He answered it didn't. I don't think there is any question pending. You asked him if OPA's going off automatically raised anybody's prices, and he said no.

183 Q. Could you have sold this Calvert merchandise in competition with other distributors selling Calvert merchandise at the OPA price?

A. I'd have to say no.

Q. No, so that you knew then that everybody else had gone up to the OPA price, didn't you,—or to the new mark-up, didn't you?

A. No, I did not.

Q. You didn't?

A. (Negative nod.)

Q. You didn't know anything about what prices your competitors were proposing to charge for the merchandise that you were agreeing to take on from Calvert?

A. No sir, I did not. Not at that time.

Q. And by "that time" you refer to November 5th?

A. Yes, sir.

Q. You didn't know that any other Indiana wholesaler had filed a 15 percent overall mark-up but you?

A. No sir, I did not know that anybody had.

Q. Well, did you have reason to believe?

A. No, I did not.

184 Q. So far as you knew, Kiefer-Stewart was going to have a price substantially higher on its merchandise than that which had been in effect previous to November 6th, and was still in effect with other wholesalers, is that right?

A. That's right.

Mr. Paul Y. Davis: That's all.

(Witness excused.)

185 JOHN P. KOEHLER, a witness called on behalf of the plaintiff, being first duly sworn to testify the truth, the whole truth, and nothing but the truth, relating to said cause, deposes and says:

Direct Examination by John D. Cochran, Esq.

Q. Would you state your name to the Court?

A. John P. Koehler—K-o-e-h-l-e-r.

Q. Mr. Koehler, what is your occupation?

A. I am a retail druggist, owner of the John P. Koehler Pharmacies.

Q. How ~~many~~ stores do you own?

A. Two.

Q. Where are they located?

A. 3002 Central and 3002 North Illinois.

Q. In your drug stores do you sell liquor at retail?

A. That's right.

Q. Have you been in business through 1946 to the present?

A. I have.

Q. And during that period you have sold liquor at retail?

A. That's right.

186 Q. During the year 1946 did you purchase a portion of your liquor from Kiefer-Stewart Company?

A. I did.

Q. Do you still purchase a portion of your liquors from Kiefer-Stewart Company?

A. I do.

Q. Mr. Koehler, what is the principal brand of whisky which you sell as far as volume of sales?

A. I would say Seagrams, Schenley, Calvert, Bond & Lillard.

Q. Now, Mr. Koehler, referring to your purchases from Kiefer-Stewart other than the Seagram or that class which you have just named,—the Seagram, Schenley Reserve, or Bond & Lillard or Calvert—that class of whisky—referring to that as other business, would you state what the comparison of your purchases of other merchandise, other liquor merchandise, from Kiefer-Stewart was comparing the present with the year 1946?

Mr. Paul Y. Davis: Just a moment. If the Court please, we object to general testimony by comparison. The mat-

ter, if relevant at all, should be proved by something
187 more than the witness' conclusion and guess.

The Court: Well, you can cross-examine him. Go ahead.

The Witness: Will you repeat the question?

Mr. Cochran: I will withdraw the question.

Q. Mr. Koehler, are your purchases from Kiefer-Stewart Company substantially lower at the present time than they were during 1946?

Mr. Paul Y. Davis: Just a moment.

A. Yes, they are.

Mr. Paul Y. Davis: To which the defendant objects for the reason that it is not a proper method of proving the facts sought, calling for a conclusion; and second, the fact that it is not relevant.

The Court: Overruled. I will let them hear what he says about that.

188 A. Materially off.

Q. Mr. Koehler, would you state to the Jury with respect to—now, I am referring to business other than these leading whiskies—would you state to the Jury why your purchases of other whisky from Kiefer-Stewart are substantially smaller now than they were in 1946?

Mr. Paul Y. Davis: If the Court please, we object.

The Court: Objection sustained.

Q. Mr. Koehler, you have testified that your purchases from Kiefer-Stewart are substantially smaller at the present time than they were in 1946. Do you, at the present time, purchase from other wholesalers a portion of the business which you formerly purchased from Kiefer-Stewart?

A. I do.

Q. Mr. Koehler, is that because Kiefer-Stewart has no Seagram, Calvert or Schenley Reserve?

A. That's right.

Mr. Paul Y. Davis: Just a moment. To which the
189 defendant objects for the reason that it is leading and suggestive, and second—

The Court: (Interposing.) Well, they have other pretty good whisky, don't they?

The Witness: Pretty good whisky, right.

Mr. Daniels: But not sales leaders?

The Witness: No leaders.

The Court: Old Cummins?

The Witness: That's a bonded whisky and very expensive; very good.

The Court: I've heard about it.

Mr. Daniels: But is Old Cummins a sales leader?

The Witness: No, it isn't.

Mr. Daniels: Seagrams is?

The Witness: That's right.

Mr. Daniels: Calvert is?

The Witness: That's right.

Mr. Daniels: Schenley is?

The Witness: That's right.

Mr. Daniels: That's all.

Cross-Examination by Paul Y. Davis, Esq.

Q. You wouldn't purchase from Kiefer-Stewart in any event, would you, Mr. Koehler, if their prices were a 190 dollar or two higher a case on the same merchandise?

A. I have never known them to be out of line.

Q. I asked a different question. May I have it answered?

A. Ask it again, please.

Mr. Paul Y. Davis: Will you read the question?

(The Notary read the preceding question, as follows: "You wouldn't purchase from Kiefer-Stewart in any event, would you, Mr. Koehler, if their prices were a dollar or two higher a case on the same merchandise?")

A. It wouldn't be in keeping with good business.

Q. Well, was your answer "yes" or "no"?

A. No.

Q. So that if Kiefer-Stewart's prices went up and everybody else's stayed the same then they'd lose the business that way, wouldn't they?

A. That's right.

Q. Do you recall any time when Kiefer-Stewart has had a higher price on any competing lines competing with Calvert products than other wholesalers?

A. I do not.

Mr. Paul Y. Davis: That's all.

(Witness excused.)

191 HORACE G. BARDEN, a witness called on behalf of the plaintiff, being first duly sworn to testify the truth, the whole truth, and nothing but the truth, relating to said cause, deposes and says:

Direct Examination by Joseph J. Daniels, Esq.

Q. Will you please state your name to the Court and Jury?

A. Horace G. Barden.

Q. Where do you live, Mr. Barden?

A. 35 Meridian Lane, Indianapolis, Indiana.

Q. By whom are you employed?

A. Ernst & Ernst.

Q. Will you tell the Court and Jury who Ernst & Ernst are?

A. Ernst & Ernst is an accounting firm, certified public accountants.

Q. Do they operate nationally or just in Indianapolis?

A. The firm has about forty-five offices in various cities within the United States.

Q. Are you yourself a certified public accountant?

A. Yes, sir.

Q. How long have you been with Ernst & Ernst?

192 Mr. Paul Y. Davis: If the Court please, we will concede this witness' qualifications as a certified public accountant.

Mr. Daniels: Good.

The Witness: Thank you.

Q. You have been with Ernst & Ernst since 1931, is that correct?

A. Yes.

Q. And of that time how many years in Indianapolis, approximately?

A. Approximately 13 years in Indianapolis.

Q. And in your connection with Ernst & Ernst has the firm as independent auditors done work for the plaintiff here, Kiefer-Stewart Company?

A. Yes, we have audited the Kiefer-Stewart account for a number of years. I'd say over 20 years, or possibly more.

Q. Have you been familiar with their books and records in a general way for several years?

A. Yes.

Q. Now, Mr. Barden, I will ask you whether you at the request of the plaintiff here have made a study and analysis of the figures and facts in order to make an estimate of the loss and profits resulting to Kiefer-Stewart during the years 1947, 1948 and the first three months of 1949, because of its not having the Seagram and the Calvert line of whiskies to sell to its customers?

A. Yes.

Mr. Paul Y. Davis: Just a moment.

The Court: How would you know that that was the cause of the loss?

The Witness: We must work on the assumption that there was a loss in sales for some reason. We know nothing of the cause of the loss.

The Court: You don't know the cause of it? Well, that's what I thought. I wouldn't know how you could.

Mr. Daniels: They have the figures. We are preparing an exhibit showing what the loss in sales was. We think we have proved here very primarily what the reason for the loss was from our own witnesses.

194 The Court: Go ahead with the next question.

Mr. Daniels: I asked him if he prepared such an exhibit showing the estimated loss in sales for the year 1947, 1948 and the first three months of 1949.

The Court: I think it would be clearly competent to show the loss of the sales. I doubt if this witness would be competent to tell why.

Mr. Daniels: He's not offered to tell why. He has offered to present the figures.

Mr. Paul Y. Davis: If the Court please, I want to object to the witness answering that question because the answer necessarily carries the conclusion that whatever he has prepared and ascertained has as a causal factor in his result the loss of Seagram and Calvert business.

The Court: I don't know whether it does or not. I'll let him answer the question on the loss.

Mr. Paul Y. Davis: If the question has been answered, I move to strike it for the purpose of objecting.

The Court: Let it go out.

Q. Did you answer that you had prepared that?

A. Yes.

Q. Will you tell the Court and Jury first what amount in dollars, based on the assumption that you have mentioned, you arrived at as the amount of loss of profits of Kiefer-

Stewart resulting from the loss in volume of liquor sales for the period I have mentioned?

Mr. Paul Y. Davis: Just a moment. If the Court please, to which we object for the reason that the only competent evidence of the fact which the witness is sought to prove are the books and records of the company. The exhibit offered and the question asked call for a hearsay answer which is not supported by any—

The Court: (Interposing.) If are going to take all of the time here to go through all the books and tell every item of expense and item of sales we will have to sit 196 here and listen, but I think it is very unfair. You have gone over the books and examined them, haven't you?

The Witness: Yes.

The Court: And you have a statement from which you are prepared to testify as to what the sales were?

The Witness: Yes.

The Court: And the expense?

The Witness: Yes.

Mr. Daniels: If we have to bring the books here we had better adjourn and go down and get them and bring them up here. It will take us days, of course.

The Court: I don't think Mr. Davis expects us to do that.

Mr. Paul Y. Davis: Well, if the Court please, possibly not. But I do object to the witness testifying simply from an examination which he has made of books which we have never seen, kept on a basis of which we know nothing, 197 to a conclusion which cannot possibly be tested.

The Court: Of course, it isn't competent for him to tell where or why the loss, but he could tell, I think, from an examination of the sales that were made and the kind, and such as that. Go ahead.

Mr. Daniels: The question was, I think, what you have figured, on your basis of calculation what you estimate these losses to be in the two years and three months I have mentioned.

The Court: You mean the losses as compared with previous years?

Mr. Daniels: That's right. This exhibit is based on that. I was asking him for his conclusion and then I am going to go through his method in calculating the loss in profits calculated from the loss of volume over this period.

Mr. Paul Y. Davis: The defendants and each of them

object to the question for the reason that it calls for a 198 hearsay conclusion based upon books whose authenticity has not been established and whose method of accounting has not been established. It is purely the witness' speculation not subject to be tested by any authentication that has been offered.

The Court: Overruled. Go ahead.

Mr. Paul Y. Davis: Exception.

Mr. Daniels: Will you answer? The question is as to the amount of your calculation.

A. The amount of this calculation as shown on our exhibit is \$679,378.

The Court: You mean that is the loss of the amount of the sales?

The Witness: It is the loss in profits calculated to have resulted from a loss in sales volume during this period.

The Court: You don't know what caused that?

The Witness: No.

199 The Court: All right.

Q. In making that exhibit and calculation, Mr. Barden, have you made certain assumptions on which you base your figures?

Mr. Paul Y. Davis: May it be understood, if the Court please, that the defendant objects for the same ground?

The Court: Yes. I don't think he can assume anything. He can tell what the books show. There is no doubt in the world about that.

Mr. Paul Y. Davis: The defendant renews the objection made to the first question asked the witness.

Q. Mr. Barden, I will ask you to tell the Court and Jury what the books of Kiefer-Stewart show as respect its total sales of liquor for the year 1946; what amount?

A. \$10,931,300.

Q. And what do the books show with respect to the total sales of liquor in the year 1947?

200 A. \$3,992,358.

Q. And what do they show with respect to the total sales of liquor in the year 1948?

A. \$3,117,723.

Q. And what do they show with respect to the total sales of liquor for the first three months of 1949?

A. \$703,975.

Q. And what were the total sales of liquor in the first three months, the same three months of November, 1946 as against the \$703,000 figure? What were they in '46?

A. \$2,239,335.

Mr. Daniels: I said the first three months of '49, didn't I?

Q. Now, on this exhibit you have prepared and which we shall offer have you shown the percentage of loss in business in each of these years—the year '47 over '46 and the year '48 over '46 and the first three months of '49 over '46?

A. Yes.

Q. Will you tell the Jury what the percentage loss of business was for the year 1947 over '46?

201 A. In the year 1947 the company's total liquor sales amount to 36.52 percent of its liquor sales in the year 1946.

Q. What did they amount to in the year 1948 over 1946?

A. 28.52 percent of the '46 sales.

Q. And for the first three months of 1949 what did they amount to in terms of percent?

A. 32.44 percent of the sales for the same period in 1946.

Q. Now, what was the total shrinkage, Mr. Barden, in the sales of liquor, the entire sale of liquor in the state in the year 1947 over the year 1946?

Mr. Paul Y. Davis: Just a moment. If the Court please, we object to that question for the reason that—

The Court: (Interposing.) What do you mean by that?

Mr. Paul Y. Davis: (Continuing.) —the witness has not shown himself qualified either as an expert—

The Court: (Interposing.) What do you mean by that?

Mr. Daniels: I mean the total millions of dollars
202 sold by all wholesalers in the state in '46 as against the total sales by all wholesalers in '47. He has compared the records of the ABC, and he is basing his testimony on that.

The Court: I don't think that is competent.

Mr. Daniels: May I ask him a few preliminary questions to bring this out?

The Court: Yes.

Q. Have you caused to be made an examination of certain of the records of the Indiana Alcoholic Beverage Commission on the liquor sales in Indiana in the years in question, Mr. Barden?

A. Yes.

Q. Have you caused a check of those figures to be made before you took them into your calculation here?

A. Yes.

Q. And are the figures which are shown on your exhibit based on that examination which was made under your supervision and check which you have mentioned?

A. Yes.

203 The Court: What sort of a check did you make?

You mean somebody else checked them?

The Witness: Yes, the Indiana Alcoholic Beverage Commission compiles certain figures on a monthly basis showing the amount of liquor stamp sales that are made in the State of Indiana. They also compile another set of figures which show the amount of liquor shipped into the State of Indiana according to their records of stamped sales by distillers, broken down into the various distillers shipping liquor into Indiana. The first type of calculation that they make or compilation of figures shows the amount of liquor stamp sales by various wholesalers in the State of Indiana on a monthly basis. Now, as to the amount of check that we have made of figures—we have caused one of our associates to take these monthly reports down to the Alcoholic Beverage Commission to determine first of all that they are compiled from the records, as to their
204 general authenticity.

As far as the total state stamp sales are concerned, the amount shown on these reports were checked with employees of the Alcoholic Beverage Commission.

The Court: Well, they might not necessarily be sold to the consumers, might they?

The Witness: These are to the wholesalers.

The Court: Well, you don't know what they did with them, the wholesalers?

The Witness: No, sir.

The Court: Whether they used them on liquor or whether they disposed of the stamps to someone else.

The Witness: We have no knowledge of what happened to the stamps.

Mr. Daniels: Except, Your Honor, they don't do anything but put them on liquor they sell, and they can only sell in Indiana.

The Court: I think they could. I think they could
205 do something else besides putting them on their own liquor to sell. I don't know of any law to prevent them.

Mr. Paul V. Davis: They don't necessarily sell the liquor the month they buy the stamps, either.

The Court: I don't think that is competent.

Mr. Daniels: Well, we may have to bring all the records from the Alcoholic Beverage Commission. here, Your Honor, because there was clearly a general decline, as everybody knows, in these sales and we will have to show from that there was this decline, and if this man—

The Court: (Interposing.) If you bring them in they won't mean anything in this case.

Mr. Daniels: Well, we are arriving at the method of calculating the damages which Kiefer-Stewart has sustained from this combination of the conspiracy and restraint of its interstate trade, and we want to give the 206 Jury the best estimate of what those damages amount to.

The Court: That's going a long way.

Mr. Daniels: I am going to offer this exhibit in evidence.

The Court: Well, it won't be admitted. I am not going to admit it in evidence.

Mr. Daniels: Well, may I ask Your Honor may we have some time to get the records over here?

The Court: Well, we are not going to keep the Jury here waiting for evidence which you ought to have known was not competent, and ask to bring in some other.

We will take a little recess now and you can think it over. I will be back in about ten minutes.

(A brief recess was taken.)

207

(After Recess.)

Q. (By Mr. Daniels.) Mr. Barden, I wish you would state from your examination of the books of the Kiefer-Stewart Company the total amount of its sales of liquors in the year 1946.

Mr. Paul Y. Davis: To which the defendants object for the reason that it is hearsay, calls for a hearsay computation without the production of the books and records from which the computation was made and without the production of any person having personal knowledge of the correctness of the books from which the computation is made.

The Court: How many books was it?

The Witness: The entire general records of the company, your Honor.

The Court: I don't know anything more about it than before.

The Witness: That would include their records of sales, starting with the sales invoices to the customers, the entries of those sales and books of original entry and 208 the summary of those sales figures into the general records of the company, which is the general ledger.

The Court: I would think it might be better to use one of the company who knows what the books contain and whether they are correct.

Mr. Daniels: I think he did testify to that earlier.

The Court: Who did?

Mr. Daniels: The witness did.

The Court: You are not a member of the company, the corporation?

The Witness: No.

Mr. Daniels: No.

The Court: That is what I say, one of the corporation.

Mr. Daniels: We can prove that record, as I said, your Honor. I would like the record to show, if it is insisted upon, we will bring the books here. Inasmuch as this certified public accountant has examined the books 209 and we will have other witnesses who will validate the correctness of the entries—

The Court: (Interposing.) I would hate to think it was necessary to take the time for bringing all those books over here and going through them for every sale and all those things, but I do think that you should have a member of the corporation who knows whether or not these books contain the truth, and then he can testify as to whether it is true or not.

Mr. Daniels: We expect to produce testimony to that effect, your Honor.

The Court: Shouldn't that be used first?

Mr. Daniels: We will have to bring the witness here. I though we might get rid of Mr. Barden.

Mr. Paul Y. Davis: Was there a ruling on the objection?

The Court: Overruled.

Mr. Paul Y. Davis: May I have an exception and the same objection without repeating it to each of the questions asked the witness on that subject?

210 Q. (By Mr. Daniels.) Let me start over. Will you please state from your examination, from the examination which you made of the books and records of the Kiefer-Stewart Company, what the total amount of its sales of liquor was in the year 1946?

Mr. Paul Y. Davis: To which the defendants object for the reason that it is hearsay, calls for information from books which are neither produced, and the authenticity of which has not been established by any witness and concerning which this witness has no personal knowledge either as to the correctness of the books or as to the facts which are recorded in the books, and I would like to have that objection stand for the entire testimony of the witness.

Does the Court so rule?

The Court: Objection overruled.

Mr. Davis: Exception.

The Court: And he may have the same objection.

211 A. \$10,931,300.00.

Q. (By Mr. Daniels.) Now, will you state from your examination of the books and records of the plaintiff the amount of its sales of liquors during the year 1947?

A. \$3,992,358.00.

Q. Will you state from your examination of the plaintiff's books and records the amount of its total sales of liquors in the year 1948?

A. \$3,117,723.00.

Q. Now, the same figure, if you please, for the first three months of 1949.

A. \$703,975.00.

Q. Now have you made a calculation, Mr. Barden, of what the loss in sales in each of the years 1947, 1948 and the first three months of 1949 amounts to as against the total sales for 1946, to which you have testified?

A. Yes.

Q. What is the total amount of that loss in sales for that period of two years and three months?

A. Had the sales in 1947, 1948 and the first quarter
212 of 1949 been at the identical rate of sales in the year 1946, they would have been \$16,287,879.00 more than the sales actually realized during that period.

Q. Have you made a calculation of the amount of additional profits which would have been realized had the company made this sixteen million plus of sales during the two years and one quarter period to which you have just testified?

Mr. Paul Y. Davis: If your Honor please, I have an additional objection to that. That is that that calls for a computation based on a great many other factors not even detailed by the witness.

The Court: Can you answer that from the figures you have in the books?

The Witness: Yes, sir. I might qualify that. I can answer it in an approximate amount, your Honor, inasmuch as prior to court this morning no such calculation was made in this amount. The calculation was made on a different basis, based on a complete review and study of the 213 figures that are shown in the books, but using a different basis of arriving at the amount of sales lost or possible additional sales that would have resulted, so that the figure that I can give at this point would be an approximate, based upon the amount of the original calculations made.

The Court: Well, I think he had better make a study of that at noon.

Mr. Daniels: We can do that, your Honor. I think I can show what we are getting at here.

Q. (By Mr. Daniels.) In your calculations, in your study of the books and records of Kiefer-Stewart, have you arrived at a percentage which in its experience it realized in profit on its liquor sales on an average?

A. Yes.

Q. Is that percentage approximately six and one-quarter per cent?

Mr. Paul Y. Davis: Just a moment.

Q. What is that amount?

214 Mr. Paul Y. Davis: I object to the question because it is leading and also because it obviously calls for a comparison percentagewise in factors which the witness has not even detailed and cannot be tested in any way.

The Court: All, it seems to me, the jury needs to know on this question is what the sales were at the time of handling their product and what they were afterwards.

Mr. Daniels: He has testified to that. Under the Supreme Court decision we can produce testimony as to the amount of the profit. I want him to testify what the approximate percentage of sales had been.

The Court: He has a right to show the profits.

Mr. Daniels: He has testified to the shrinkage and I am now asking what the percentage of profits was on the sales in the years 1946 and earlier. He is prepared to testify to that.

The Court: Objection overruled.

215 Mr. Paul Y. Davis: Exception.

Q. (By Mr. Daniels.) Will you testify what that percentage was?

A. The additional profit that would have been realized had the company had the additional sixteen million dollars in sales referred to in a previous question is approximately six and one-half per cent.

The Court: That would be how much?

The Witness: Applied to the sixteen million dollar figure, it would be approximately one million and fifty thousand dollars.

Q. (By Mr. Daniels.) Now, in reaching that percentage, Mr. Barden, you took into account the additional costs which would have been entailed in making that additional amount of sales, did you?

A. Yes.

Q. Now before the recess you testified that you had arrived at a figure of \$679,378.00 as your estimated loss in profits. Will you explain briefly the reason for the difference between that estimate and the one that you 216 have testified to?

A. The figure of \$679,378.00 is based upon a loss in sales calculated to amount to \$10,390,935.00, whereas the figure you just quoted is based upon a loss in sales of \$16,287,879. The lower figure, the ten million dollar figure, was calculated on a basis which recognizes a general decline in the state in liquor business, whereas the loss of sixteen million dollars is calculated merely by comparing actual sales in the subsequent period with the sales actually realized in 1946 by the company.

Mr. Daniels: I think that is all, your Honor.

Cross-Examination by Mr. Paul Y. Davis.

Q. Mr. Barden, how much of that total sales figure for 1946 represents sales of whiskey.

A. I do not have a figure available of the exact amount of whiskey sales.

Mr. Daniels: You mean as distinguished from other 217 liquors, cordials and things of that kind?

Mr. Paul Y. Davis: Yes,

A. I don't have the figure with me.

The Court: They just handled the whiskey?

Mr. Daniels: No, they handled all other things and he has not the breakdown.

Q. (By Mr. Paul Y. Davis.) How much of that figure of ten million odd dollars of 1946 liquor sales represents sales of Seagram products?

A. A little over seven hundred thousand dollars.

Q. You mean that of the total sales by Kiefer-Stewart, all forms of liquor, cordials, wines, in 1946, seven hundred thousand dollars approximately is the amount realized from sales of Seagram products?

A. Yes, sir.

Q. What is the remaining ten million two hundred thousand odd dollars of sales?

A. Just as you have described it, of all other liquors, wines, cordials, and so on.

Q. What part of that is represented by sales of rum?

218 A. I don't have such a figure.

Q. Do you know what part of those sales were sales of potato blend spirits or cane blend spirits?

A. No.

Q. Mr. Barden, just how much of a breakdown of that figure can you give us from the investigation of the Kiefer-Stewart books that you made?

A. From our investigation the company's records are maintained on a basis of the total liquor business, as a liquor department. In other words, their records show a figure periodically and currently by years, months and so on, of liquor sales in total. The sales figure, as such, being the billing price to dealers, is not broken down or analyzed in any further breakdown in the ordinary course of their recording sales transactions, outside of the information that is available in the individual sales invoices, which, of course, are the supporting data for the total figures, and certain other corollary records, such as records of sales by items and cases that are maintained in connection with their purchasing department records, inventory control records, etc.

219 Q. Then you made no separate computation of the kinds or varieties or brands or other breakdown in the figures of those sales except to determine that of the total of ten million nine hundred thousand odd dollars, seven hundred thousand dollars gross amount resulted from the sale of Seagram products?

A. Right.

Q. Is that true of the figures that you gave for the year 1947, '48 and a portion of 1949?

A. Right.

The Court: That is, your figures don't show what the profit was, if any, on the Seagram sales, is that right?

The Witness: No.

Q. (By Mr. Paul Y. Davis) Did you ascertain other than by its percentage relation to the total dollar amount what the profit was on the sales of those Seagram products in the year 1946?

(The reporter read the previous question.)

220 A. No.

Q. Did you calculate on those Seagram products and the sales thereof what the gross profit was over and above the cost of merchandise to the Kiefer-Stewart Company?

A. No.

Q. Did you make any comparison of the sales for 1946 with sales of Kiefer-Stewart prior to the time OPA price controls were imposed?

(The reporter read the previous question.)

The Court: When was it they were imposed?

Mr. Paul Y. Davis: Sometime in the year 1942, I think.

Mr. Daniels: 1943, your Honor.

Mr. William G. Davis: It is stipulated.

Mr. Daniels: It is in the stipulation.

A. I would like to hear that question read again.

(The reporter read the previous question again.)

221 A. With what respect, may I ask?

Q. (By Mr. Paul Y. Davis) With respect to annual volume of liquor sales.

A. Yes.

Q. Annual profits?

A. Yes.

Q. Do you have available the volume of liquor sales by Kiefer-Stewart in the years 1939, '40, '41 and '42?

A. No.

Q. What comparison did you make then?

A. Comparison was made of volume, I believe, starting in around 1940, possibly 1939 or '40, of sales volume and average gross profit, as you describe it, for the period from about 1940 on through the current period.

Q. When you say 1940 on through the current period, you mean from 1940 through '46, '47, '48, and three months of '49?

A. Yes.

Q. What was the total volume of sales of Kiefer-Stewart for the year 1945?

222 A. I don't have that figure with me.

Q. Did you make any allowance in any of the calculations you made for the fact that some of these years in question were years of whiskey shortage and the other types of liquor were in much greater relative volume?

A. Yes.

Q. In what manner did you make that allowance?

A. In arriving at the figures which I stated earlier in the testimony that the calculated loss in sales was a ten million dollar figure rather than a sixteen million dollar figure.

Q. Well, I thought you testified that in making that allowance you had simply taken into consideration the fact that liquor sales in general dropped off in the years '47, '48 and '49.

A. The calculation actually was made on a basis which broke down or analyzed that drop-off in business between Seagram business, Calvert business, and all other business. In other words, it was not the state general average that was considered in the calculation, but the general average after eliminating those leaders.

223 Q. Well, what part of this figure of ten million five hundred thousand dollars is attributable to Calvert Sales?

(The reporter repeated the question.)

A. I assume that you are referring to the stated figure representing the calculated loss in volume, \$10,390,000 is the figure.

Q. Yes.

A. The calculation in that instance is based upon extending for each of the years '47, '48 and the first quarter of 1949 the amount of Kiefer-Stewart sales actually realized with respect to Seagram and to all other business at the same ratio that was calculated to represent the relationship between '46 and these subsequent periods on Seagram business and all other business in the state, plus an amount based upon sales which would have been realized in that period had Kiefer-Stewart realized additional sales in 1947, '48 and the first quarter of 1949 at the 224 rate which Calvert sales were calculated to have increased in the state for those periods, applied to a base figure representing the approximate wholesale selling price of two thousand cases per month of Calvert whiskey.

Q. You mean, Mr. Barden, that you first assumed that in 1947, '48 and part of '49 Kiefer-Stewart would have sold two thousand cases a month of Calvert whiskey, and then you assumed that they would have realized the profit from it, which you calculated by first ascertaining its initial cost to Kiefer-Stewart and then you added that to all figures otherwise arrived at?

A. With one exception and that is that the amount of Calvert sales calculated which would have been realized in this period were not computed at two thousand cases a month, but at a figure higher than two thousand cases per month, on the theory that if the company had had two thousand cases per month in 1946, they would have realized a certain amount of sales of Calvert products. But the

fact that Calvert products increased in sales in the
225 State of Indiana considerably in excess of the state average during the period '46, '47, '48 and the first quarter of '49, that amount, based on two thousand cases, was increased to the average amount that was sold within the state or that was calculated to have been sold within the state during those periods.

Q. Mr. Barden, that entire calculation, so far as it embodies any figures on Calvert, is based entirely upon a series of assumptions by you that are nowhere justified by Kiefer-Stewart books. Isn't that so?

A. The assumptions are not by me. I am in the position of making a calculation for my client, based upon their assumptions, which I have examined and investigated as to their reasonableness.

Q. Well, let's find out how many assumptions supplied by your client are in your figures. In projecting the probable sales in the years '47, '48 and '49 to an increase of something over ten million dollars above the actual sales, what did you assume?

A. The principal assumption was this: May I again correct you, that the assumptions are not mine—the assumptions given were represented, we will say,—it was that Kiefer-Stewart business analyzed into three gen-
226 eral categories, namely, Seagram business, Calvert business, and all other business, would be projected at the levels which would have been realized had Seagram business of the company followed the same trend calculated for Seagram business throughout the state during the period of '47, '48 and the first quarter of '49, and I can give you those approximate relationships, if you would like.

Q. Just give me the assumptions first.

A. That Calvert business would have been realized by applying the state averages on Calvert business as calculated to a base figure for Kiefer-Stewart of two thousand cases a month, and that all other business of Kiefer-Stewart would have followed the same trend in ratio of 1947, '48 and the first quarter of '49 to the 1946 figures that all other business in the state was calculated to have followed in those periods.

Q. Now, what effect on those calculations does the figure for gross sales of 1946 have?

A. The sales for 1946 were used as the base upon which the calculations were made to arrive at a projected 227 sales figure in 1947 and subsequent.

Q. Well, did your calculations take into account that a great many items included in that ten million nine hundred thirty-one thousand dollars of gross sales for 1946 fell off very substantially in subsequent years, when more publicly acceptable products were available?

A. They take account to this extent: that that entire classification of sales was projected at the rate calculated that all other similar sales in the state fell off in relation to '46. In other words, that was the basic principal reason for pulling out of the base figures in calculating relationships to '46 business or for pulling out the leaders or the big whiskey sellers in the state, so that you arrived at a base figure for all other business, which included the items which you mentioned.

Q. Well, then, you had three sets of figures upon which you projected a trend: first, Seagram products; second, Calvert products; and third, all other liquor products of every description?

A. Right.

228 The Court: Can we adjourn at this time without interfering?

Mr. Paul Y. Davis: I am not through with the witness but to adjourn will be very welcome.

The Court: You are not insisting on them bringing all the books over here?

Mr. Paul Y. Davis: If the Court please, I am not insisting on trying the case in any other manner than they please. I do insist upon my objections to the questions asked the witness.

The Court: Well, you have got that, but I suspect to bring all the books over here would be a load, wouldn't it?

The Witness: More than I could carry, sir.

The Court: I don't think it would be necessary at all to have that done.

You may stand aside, please.

(Witness temporarily excused)

229 The Court: We are going to adjourn now at this time, ladies and gentlemen, until two-fifteen and during the time we are adjourned, I wish you would kindly keep in mind the things I have said to you heretofore about talking about the case or letting anybody talk to you about it in your presence or hearing, or reading anything about it in the newspapers. Be back at two-fifteen.

Whereupon at 1:05 O'clock P. M. the Court Adjourned Until This Afternoon at 2:15 O'clock.

230

Indianapolis, Indiana,
Thursday, May 19, 1949,
2:15 O'clock P. M.

The Court met pursuant to adjournment and the trial was resumed as follows:

BARDEN, a witness on behalf of the Plaintiff, being recalled, having been previously sworn, testified further as follows:

Cross-Examination (Resumed) by Mr. Paul Y. Davis.

Q. Mr. Barden, in your examination of the gross sales for the years '46, '47 and '48 and a portion of '49, did you ascertain whether or not any of those sales were affected by the discontinuance of any brands or lines of merchandise that were sold in '46 and not sold in later years except in reference to Seagram's?

A. No, except with reference to Seagram's, we did.

Q. But you have no way of telling what merchandise or brands went to make up the sales of '46 that were not carried in '47 or '48 or '49 except in that one instance?

231 A. That is right.

Q. And I think I have asked you this, you made no separation of the sales of any of those years with reference

to whiskey of all kinds and all other alcoholic liquors or beverages sold?

A. That is right.

Q. On what basis did you allocate costs of the liquor department and costs of the other departments of the Kiefer-Stewart business?

A. As to merchandise cost, the company's records show merchandise cost by departments, so that we were able to compile figures on merchandise cost in the liquor department, which is the cost of liquor purchased or cost of liquor sold, you might say. As to other expenses, operating expenses, the company maintains records on salesmen's commissions which are paid on liquor business, which enable compilation of figures as to the amount of sales commission paid. Such direct items as freight on shipments, Indiana gross income tax, are readily calculated from knowing the amount of sales. The company has one category of expense in their records which is analyzed departmentally which are miscellaneous direct expenses, which they do allocate in their records on a departmental basis. That general classification of expense includes such items as traveling of supervisors, salaries of supervisors. Those are sales supervision executives. Such items as dues or permits and other items of direct expense incurred which can be definitely allocated to a department in the business.

Does that answer your question?

Q. That answers it partially. Are there no other items of expense, so-called overhead expense, that enter into your calculations?

A. Oh, yes, they are in the calculation that has been made. It has been generally on this basis of calculating the additional expenses that would have been incurred had the company realized an additional volume in liquor sales.

Now that calculation was made in this manner: It was made in the case of merchandise cost by calculating the merchandise cost which would have been incurred in making these additional liquor sales at the average gross margin or at the average ratio of merchandise cost to sales that the company actually realized on all its sales in their fiscal years 1947 and 1948.

Q. That isn't what I am trying to get at. Your figure of six and some fraction per cent of ratio of profit to sales was calculated on the basis of the 1944 experience, was it not?

A. No. That is the resultant figure of the calculations, by allocating cost and expenses which would have been incurred on this additional volume of business.

Q. Well, did you find that ratio separately for each year or did you calculate it for—

A. (Interposing.) For each year.

Q. What was that ratio in the year 1946?

A. We don't have a calculation of the ratio. I can give you an approximate amount reading from the schedule, or you can calculate it. The amount of additional profits in the year 1947 are three hundred.

Q. I asked for '46.

A. For '46?

Q. Yes.

234 A. We have made no calculations of it for '46. We are not concerned with the calculation in '46 particularly.

Q. You did not test the correctness of your profit ratio to sales by seeing what it was in 1946?

A. Profit ratio to sales does not enter into our calculation for the year 1946.

Q. Well, what was the actual ratio of profit to sales in the year '47?

A. We have made no such calculation for the year '47.

Q. What was the actual ratio of profit to sales in '48 or the fraction of '49?

A. We have made no such calculations, as I don't have those figures available. It could be calculated quite readily, in fact.

Q. The figure that you have given us, then, is a purely theoretical figure, based upon certain assumptions as to what the business would have been if certain other items of merchandise had been available and sold. Is that right?

A. It is a calculation of the amount of profits that would have been realized had the company had an additional volume of sales of some dollars. The figures
235 used, as you know, were an additional sales volume of \$10,390,000.

Q. I understand, Mr. Barden, and the additional sales volume which you used in that calculation was one that you arrived at by making the assumptions that you were directed to make as you have previously testified?

A. Right.

Mr. Paul V. Davis: That is all.

Mr. Daniels: He has one figure he figured during the noon hour. Your Honor asked him to get the exact amount of one figure.

Mr. Barden, did you during the noon hour find time to make calculation of the figure which the Judge asked you about?

The Witness: Oh, yes. Your Honor, I believe you asked the question at the point in the testimony where I was asked to give a figure on the amount of loss in sales computed by comparing actual 1947 and 1948 and the first quarter of 1949 sales with the actual sales in 1946. 236 The loss in sales resulted in that calculation to an amount of \$16,287,879.00, which I believe is in the record, and at that point you asked if I could give you a calculation of the amount of profits that would have been lost on those sales or the amount of profits which would have been realized had the company maintained its sales at the identical volume that they had in 1946. The amount is \$1,071,506.00.

Mr. Daniels: That is all.

Witness excused.

Mr. Paul Y. Davis: If the Court please, the defendants move to strike the testimony of this witness for the reason that it appears to have been based wholly upon hearsay and wholly upon assumptions which the evidence does not justify.

The Court: Overruled.

Mr. Paul Y. Davis: Exception.

237 WILLIAM L. MARSH, a witness called on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct Examination by Mr. Daniels.

Q. State your name and residence to the Court and jury.

A. William L. Marsh, 3416 East Fall Creek Parkway.

Q. What is your business, Mr. Marsh?

A. Auditor and comptroller of Kiefer-Stewart Company.

Q. How long have you occupied that position?

A. Approximately thirty-two years.

Q. As such, Mr. Marsh, are all the operating books and records of the company under your control and charge?

A. They are.

Q. Mr. Marsh, were you familiar with the investigations which Mr. Barden and his associates in the firm of Ernst & Ernst recently made of the books and records of Kiefer-Stewart Company in connection with testifying in this case?

A. I am.

Q. Did you supply Mr. Barden and his associates
238 with the books from which they took their figures?

A. I did.

Q. I will ask you to tell the Court and jury whether or not those books and records you supplied Mr. Barden and his associates truly and correctly reflect the operations of the company for the period covered.

A. They do.

Mr. Paul Y. Davis: I would like to move the question be stricken for the purpose of objecting.

The Court: Well, you can object to the answer. There has to be a question before you can object.

Mr. Paul Y. Davis: The objection is it is not the proper way to prove the correctness of the books because it is wholly a conclusion as to whether or not the entire series of operations has been correctly performed.

The Court: Overruled.

Q. (By Mr. Daniels.) You answered the question
239 that they did?

A. They did.

Mr. Daniels: That is all.

Mr. Paul Y. Davis: No questions?

Witness excused.

WALTER LUTZ, a witness called on behalf of the Plaintiffs, having been previously sworn, was recalled to the stand and testified further as follows:

Direct Examination by Mr. Daniels.

Q. You are the same Walter Lutz who has previously testified in this case?

A. Yes, sir.

Q. You stated your experience and the length of time that you have been with Kiefer-Stewart in your former testimony?

A. Yes, sir.

Q. Mr. Lutz, have you been in the courtroom and
240 have you heard the testimony of Mr. Barden concern-
ing the loss in sales and profits of the Kiefer-Stewart
Company on account of the failure of it to have the Sea-
gram line in '47 and '48 and the first three months of '49
and not having the Calvert line during the same period?

A. Yes, sir.

Q. Do you remember that he testified that the loss in
sales would have been approximately sixteen million dol-
lars?

Mr. Paul Y. Davis: Just a moment. I object to the
witness testifying about what some other witness testified.

Mr. Daniels: I am going to ask his opinion as an ex-
pert.

The Court: Well, you heard the testimony?

The Witness: Yes, sir.

Q. (By Mr. Daniels.) I wish you would state to the
Court and jury what in your opinion, based on your ex-
perience as head of the liquor department of the Kiefer-
Stewart Company, would be the approximate amount
241 of that million dollars plus of actual loss of profits
attributable to the loss of the Seagram line and the
failure to get the Calvert line during the period of 1947,
'48 and the first three months of 1949.

Mr. Paul Y. Davis: To which the defendants, and each
of them, object for the reason it calls for an opinion and
a conclusion of the witness upon a matter, and which con-
clusion of the testimony is not proper and invades the
province of the jury, who alone may form a conclusion.

The Court: I think it is proper testimony. I don't
know how much weight it has.

Mr. Daniels: Certainly, under the decisions in these
cases there will have to be some estimates made in an anti-
trust case.

The Court: I think it is competent.

Mr. Daniels: You may answer.

A. In my opinion, approximately two-thirds of the
242 loss.

Q. Was due to the failure to have the Seagram and
242 Calvert lines?

A. To the failure to have the Seagram and Calvert
lines.

Q. To what was the other third due?

A. The other third was due to the general decline in business.

Q. The other one-third was due to the general decline in business?

A. Yes, sir.

Mr. Daniels: That is all.

Cross-Examination by Mr. Paul Y. Davis.

Q. Did you hear the testimony of the witness preceding you, that the total Seagram sales for the year 1947 were approximately seven hundred thousand dollars?

A. Yes, sir.

Q. How many cases per month on the average does that represent?

Mr. Daniels: '46—I believe you said '47.

Mr. Paul Y. Davis: Did I say '47? I intended to say '46.

243 A. I think, if I remember correctly, that is somewhere in the neighborhood of three thousand cases a month.

Q. (By Mr. Paul Y. Davis.) Then two hundred cases a month would be approximately two-thirds of that amount, would it not?

A. Sir?

Q. Read the question.

(The reporter read the previous question.)

A. It would not.

Q. (By Mr. Davis.) Was it?

A. It would not.

Q. I intended to say two thousand.

A. Yes, sir.

Q. Now how much would your gross from two thousand cases a month be?

A. Gross profits?

Q. No, gross sales.

A. According to sizes, it might average somewhere around eighty thousand dollars—something like that.

244 Q. How much?

A. Eighty thousand dollars, more or less.

Mr. Daniels: Per month?

The Witness: Yes, sir.

Q. (By Mr. Davis.) Is it your recollection that Kiefer-Stewart sold about three thousand cases per month of Seagram merchandise during the year 1946?

A. No, because we did not have it for twelve months.

Q. Well, then, let's start over again, Mr. Lutz: You did hear the testimony of the auditor that Seagram sales of Kiefer-Stewart for the year 1946 were approximately seven hundred thousand dollars?

A. Will you strike out my previous answer? I can give you the exact total in 1946—17,046 cases were delivered to us.

Q. How many?

A. 17,046.

Q. In twelve months?

A. No, ten months.

Q. You had no Seagram's at all to sell in November and December?

245 A. There was none delivered to us in November and December.

Q. None delivered to whom?

A. Kiefer-Stewart Company.

Q. Well, what we are investigating now is Kiefer-Stewart's deliveries to its customers that resulted in seven hundred thousand dollars. Any part of that delivered in November and December?

A. That I can't answer. I don't know. There might have been.

Q. Well, the total for the year was seven hundred thousand dollars, was it not?

A. That is what the auditors figured from the invoices, yes.

Q. Well, in your judgment is that correct or otherwise?

A. Yes, sir.

Q. That does not average three thousand cases a month, does it?

A. No, I said I made a mistake in that figure.

Q. And you anticipated that you would sell more Calvert merchandise in 1947 than you sold Seagram merchandise in 1946?

246 A. Yes, sir.

Q. Your gross sales dropped off in 1947 approximately seven million dollars, did they not?

A. Yes, sir.

Q. What?

A. Yes, sir.

Q. But you say that two-thirds of that was due to your failure to sell about a million and a half dollars worth of Seagram's and Calvert's?

A. Yes, sir.

Q. Any part of that due to the fact that you sold in 1946 a great deal of rum, potato spirit whiskey, cane spirit whiskey, other less desirable merchandise?

A. No more than the general trend in the market.

Q. Well, what does that answer mean, Mr. Lutz?

A. Well, I mean that the state figures show that everybody was off some. We would have been off no more than the rest of them.

Q. Well, do you know what your figure on those undesirable types of merchandise were for the year 1946 as compared with 1947?

A. No, sir.

247 Q. You know it to be a fact, don't you, that you sold a lot of that stuff in 1946 that you could not sell and would not restock in 1947?

A. Some, not a lot.

Q. Well, that was a factor that affected your falling off in sales?

A. Very small.

Q. Did you have any close-outs on that unmerchantable type of liquor in '46 or '47 in order to dispose of it?

A. We might have had some.

Q. Well, did you?

A. As to exact dates, I can't say. We probably did.

Q. You had some considerable amount of that merchandise that you got rid of by selling at a loss, didn't you?

A. No, sir.

Q. Did you have any?

A. At a loss?

Q. Yes.

A. There might have been a small amount.

Mr. Paul Y. Davis: That is all.

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Redirect Examination by Mr. Daniels.

Q. One question: You said in response to a question on cross examination that you attributed the loss that you had in volume to the loss of the Seagram and the failure to get the Calvert line, even though the loss was larger in dollars than the amount of the two lines would have been. Tell the jury why.

A. I would only have to repeat Mr. Baker's testimony, those lines would be door-openers to our salesmen as well

as to other people and we would get a greater proportion of the other business.

Mr. Daniels: That is all.

Mr. Paul Y. Davis: That is all.

Witness excused.

249 Mr. Daniels: Now, your Honor, we are ready to come to the answers to the interrogatories which we want to put in evidence. As I understand Mr. Davis, he wants every interrogatory read and the answer. We would be willing to omit the reading of a great many, as long as they could be referred to in the argument and referred to in the record. If it is the other way, one better take the stand and read the interrogatory and the other the answer.

Do you want the whole interrogatory and the answer?

Mr. Paul Davis: Such of the interrogatories as are admitted, I would like to have read to the jury. I think it is entirely too burdensome for counsel to have to guess at what the jury has heard before the case is disposed of.

The question is how the plaintiff shall introduce the plaintiff's answers to the interrogatories. I was saying I would prefer to have them introduced in the regular way by having them read to the jury. I want the jury to
250 hear such of those as are admitted.

The Court: Well, I assume—

Mr. Daniels: We would be willing to omit a large number of them but we will have to do it the other way.

Mr. William Davis: There is one group that Mr. Davis stipulated about the dates of incorporation and we can read those.

Mr. Paul Davis: It seems to me if the evidence is already in the record, then those interrogatories can be ignored altogether.

The Court: I would think so.

Mr. William Davis: We won't read those then.

The Court: How many interrogatories do you have?

Mr. Daniels: Oh, I imagine there are, each of the four companies—I imagine they will run around a hundred, your Honor, but some we can eliminate on the basis that they have been stipulated but those that have not been, even though we don't care to read them, we will have to
251 read, that's all.

Mr. William Davis: The answer is in one group of papers and the questions in another so Mr. Cochran will take the stand and I will read the questions.

(Mr. Cochran took the stand.)

Mr. William Davis: The interrogatories propounded by plaintiff to the defendant, Calvert Distillers Corporation.

The Court: Go ahead.

Mr. William Davis: Interrogatory No. 1:

The Court: Why not let him read the interrogatory and the answer?

Mr. William Davis: The interrogatory is not there.

The Court: Probably many interrogatories there that have nothing to do with the case that are already in the Stipulation.

(Mr. William Davis read the interrogatories pertaining to Calvert Distillers Corporation and Mr. Cochran read the answers as follows:)

(Interrogatory No. 1 and Answer.)

(Interrogatory No. 2 and Answer.)

(Interrogatory No. 3 and Answer.)

(Interrogatory No. 4 and Answer.)

(Interrogatory No. 5 and Answer.)

(Interrogatory No. 6 and Answer.)

(Interrogatory No. 7 and Answer.)

(Interrogatory No. 8 was read.)

Mr. Paul Davis: To which the defendants and each of them object because it is wholly irrelevant.

The Court: Is that throughout the United States?

Mr. William Davis: Yes, your Honor.

The Court: I think that is taking in a good deal of territory.

Mr. Daniels: Our theory is it has a bearing on the whole conspiracy. They undertook to do this because of its size.

The Court: If that is your viewpoint—

253 Mr. Paul Davis: (Interposing.) I did not quite complete my objection. The matter can only have a prejudicial effect upon the defendant.

The Court: Go ahead and read it.

(Mr. Cochran read the answer to Interrogatory No. 8.)

(Interrogatory No. 9 and Answer was read.)

(Interrogatory No. 10 was read.)

Mr. Paul Davis: To which question and the answer thereto, the defendants and each of them object for the reason it is not relevant to any issue in the case and only tends to confuse the case.

The Court: Overruled.

(The answer to Interrogatory No. 10 was read.)

(Interrogatory No. 11 was read.)

Mr. Paul Y. Davis: To which the defendants and each of them object.

The Court: Objection sustained.

We are taking a lot of time. If it does not mean any more to the jury than it does to me—

254 Mr. Daniels: (Interposing.) We don't like to do it. It's the other side—

Mr. Paul Davis: (Interposing.) I don't understand the putting of something in the record for a jury trial that is kept from the jury.

If it is fit to be introduced in evidence, it is certainly fit to be heard by the jury.

The Court: I say, if they don't mean any more to the jury than to the Court, they don't mean much.

Mr. Paul Davis: I don't think some of them are relevant.

Mr. Daniels: We think they are very relevant. Your Honor ruled upon that. They were passed upon objections.

Mr. Paul Davis: If the Court please, the objections to discovery are quite different from the introducing in evidence.

The Court: Ordinarily they are not read to the jury. I never heard one read.

Mr. Daniels: I don't know how we are going to get the evidence in.

255 The Court: Take all the time you think is necessary.

Mr. Daniels: We will be perfectly willing to refer to them but if they have to be read, they have to be read.

The Court: I don't see anything yet you can refer to that will be of any assistance to the jury.

Mr. Daniels: Some are very relevant.

(Mr. William Davis read Interrogatory No. 12(a) and 12(b).)

The Court: You say that is taxes?

Mr. William Davis: Net.

Mr. Paul Davis: The defendants and each of them object—

The Court: (Interposing.) Sustained.

(Interrogatory No. 13 was read, objected to by Mr. Paul Davis and objection sustained.)

(Interrogatories Nos. 14, 15, 16 and their answers were read.)

256 (Mr. William Davis read Interrogatory No. 18.)

Mr. Daniels: Leave that one out.

(Interrogatory No. 19 was read.)

Mr. Paul Davis: To which the defendants and each of them object, for the reason that it is irrelevant.

The Court: I don't think it has any place in the case.

Mr. William Davis: If your Honor please, the next question will indicate by the question and answer that the advertising of Calvert and Seagram did not identify each with the other. The purpose of this question is to show the extent of that advertising.

Mr. Paul Davis: If the Court please, the extent of the advertising—

The Court: (Interposing.) I think the objection is well taken.

Mr. Daniels: The exceptions go automatically?

257 The Court: Yes.

(Interrogatory No. 21 was read.)

Mr. Paul Davis: To which the defendants and each of them object.

Mr. William Davis: We can let that go out.

The Court: It is practically the same question.

(Interrogatory No. 22 was not read.)

(Interrogatory No. 23 and the answer was read.)

(Interrogatory No. 24 was not read.)

(Interrogatories Nos. 25, 26, 27 and 27(a), (b), (c) and (d) and the answers were read.)²

Calvert Distilling Company.

(Interrogatories Nos. 1, 2 and 3 and the answers were read.)

(Interrogatory No. 4 was not read.)

(Interrogatories Nos. 5, 6 and 7 were read, and objected to by Mr. Paul Davis as irrelevant to any issue in the case and prejudicial.)

258 Mr. William Davis: We will let it go out, your Honor.

(Interrogatories Nos. 8, 9, and 10 were omitted.)

(Interrogatories Nos. 11, 12, 13, 14, 15, 16, 17, 18, and 19 and their answers were read.)

(Interrogatories Nos. 20, 21, 22 and 23 were omitted.)

(Interrogatory No. 24 was read.)

Mr. Paul Davis: To which the defendants and each of them object.

The Court: It might become material I think. Go ahead and answer.

(The answer to Interrogatory No. 24 was read.)

(Interrogatory No. 25 and the answer was read.)

(Interrogatory No. 26 was omitted.)

(Interrogatories Nos. 27, 28, 29, 30 and 31 were read.)

259 Joseph E. Seagram & Sons.

(Interrogatories Nos. 1 and 2 and the answers were read.)

(Interrogatories Nos. 3 and 4 were omitted.)

(Interrogatory No. 5 was read and objected to by Mr. Paul Davis. Objection sustained.)

The Court: I don't know what that has to do with it, the assets. It is a question of whether or not there was a conspiracy there in restraint of trade. It is not what they are worth.

Mr. Daniels: It shows the inter-connection of the defendants and their size.

The Court: Doesn't that say Calvert?

Mr. Daniels: Consolidated would include Seagram and Calvert.

The Court: What would that have to do with it?

Mr. Daniels: It shows the size and the ability to carry out their plans.

The Court: We will meet that when we come to it.
260 Mr. Daniels: You are overruling that?

The Court: I think so, it does not mean the value of the property owned jointly by them.

Mr. Daniels: No.

(Interrogatory No. 6 was omitted.)

(Interrogatory No. 7 was read.)

Mr. Paul Davis: To which the defendants and each of them object.

The Court: That is the same question there, practically the same question we have had.

Mr. Daniels: To the other defendants.

Mr. Paul Davis: To which the defendants and each of them object.

The Court: You don't need to object, it will be sustained.

Mr. Paul Davis: The matter is irrelevant and prejudicial.

The Court: I don't think it has anything to do with it. I want everything in that will help the jury to decide.

(Mr. William Davis read Interrogatory No. 8.)

261 (It was objected to and the answer was omitted.)

(Interrogatories Nos. 9, 10, 11, 12 and 13 were omitted.)

(Interrogatories Nos. 14 and 15 and the answers were read.)

(Interrogatories Nos. 16, 17, 18, 19, 20, 21, and 22 were read.)

(Interrogatory No. 23 was a duplicate, was not read.)

(Interrogatory No. 24(a) and 24(b), 25, 26, 27, 28, 29 and 30 were omitted.)

(Interrogatory No. 31 was read.)

Mr. Paul Davis: To which the defendants and each of them object for the reason it is irrelevant and prejudicial to the case.

The Court: Objection overruled.

(The answer to Interrogatory No. 31 was read.)

(Interrogatory No. 32 was read, was objected to by Mr. Davis, was overruled by the Court and the answer was read.)

262 (Interrogatory No. 33 was omitted.)

(Interrogatory No. 34 was read.)

(Interrogatory No. 35 was admitted.)

(Interrogatory No. 36 and the answer was read.)

(Interrogatory No. 37 was omitted.)

Seagram Distillers Corporation.

(Interrogatories Nos. 1 and 2 and the answers were read.)

(Interrogatory No. 3 was omitted.)

(Interrogatories Nos. 4, 5 and 6 and the answers were read.)

(Interrogatory No. 7 was read.)

Mr. Paul Davis: To which the defendants and each of them object for the reason that it is irrelevant to the issues in the case and tends to be prejudicial.

Mr. William Davis: On volume of sales I believe your Honor let one be read on one Calvert Company throughout the United States.

The Court: I don't recall that I did. I can't see
263 that it will help one way or the other, but go ahead
and read it and I will overrule the objection if you
think it is necessary.

Mr. Daniels: Read it for the last three years.

(Mr. Cochran read the answer for '46, '47 and '48.)

(Interrogatories Nos. 8 and 9 were omitted.)

(Interrogatory No. 10 was read, objected to by Mr. Paul Davis. Objection sustained.)

(Interrogatories Nos. 11 and 12 were omitted.)

(Interrogatories Nos. 13, 14, 15 and 16 and the answers were read.)

(Interrogatories Nos. 17, 18 and 19 were omitted.)

(Interrogatories Nos. 20, 21, 22, 23, 24, 25, 26, and 27 and the answers were read.)

(Interrogatory No. 29 was omitted.)

Mr. Davis: That concludes them.

The Court: Let's take a ten-minute recess.

10-minute recess.

264 Mr. Daniels: Your Honor, the plaintiff rests.

Mr. Paul Davis: I have a motion to make. I don't think I should make it in the presence of the jury.

The Court: Let the jury step out.

(The jury retired from the jury box.)

Mr. Paul Davis: The defendants and each of the defendants move the Court to instruct the jury to return a verdict for the defendants and each of the defendants. The ground of the motion is that the plaintiff has not shown any violation of the laws of the United States either by way of wrongful acquisition of stock, destroying competition between any of the defendants or any competition, and has shown no combination, conspiracy or agreement between the defendants or between any of the defendants in violation of the Sherman Act, and, therefore, there is no cause of action supportable on the evidence.

The Court: Your motion will be overruled and there will be an exception. I think there is sufficient evi-
265 dence to at least put the defendant on the defense.

I admit it is not as strong a case as some that I have had, but I think there is sufficient evidence to justify the Court in overruling the motion for a directed verdict. I think that is justified and you may have an exception. Do you have your witnesses here?

Mr. Paul Davis: We have a deposition and one witness that will consume more time than is left.

The Court: Have them come in.

(The jury was returned to the jury box.)

266 JAMES E. FRIEL, a witness called on behalf of the Defendants, being first duly sworn, testified as follows:

Direct Examination by Mr. Paul Davis.

Q. You may state your name and place of residence.

A. James E. Friel, 405 Lexington Avenue, New York.

Q. Will you speak a little more loudly, Mr. Friel so the jury can hear you?

A. I will try to.

Q. Speak to the jury.

A. All right.

Q. Mr. Friel, what is your position with reference to Joseph E. Seagram & Sons, Inc.?

A. I am Vice President and Treasurer.

Q. What is your position with reference to Seagram Distillers Corporation?

A. Vice President and Treasurer.

Q. What is your position with reference to the Calvert Distilling Company?

A. Vice President and Treasurer.

267 Q. What is your position with reference to Calvert Distillers Corporation?

A. Vice President and Treasurer.

Q. Are you a director of each of those companies?

A. Yes, sir.

Q. Did you occupy the same position with these companies?

A. Since 1934.

Q. Did you occupy the same position with these companies in the year 1945 as you now occupy?

A. Yes, sir.

Q. Are you familiar with the transaction by which the stock of the Calvert Distilling Company was transferred to Joseph E. Seagram & Sons, Inc.?

A. I am.

Q. First, what were the circumstances under which that transfer of stock was made?

A. We transferred the stock because up to the time the transfer was made we had two companies borrowing monies from the bank and doing business with the investment bankers. The banks prefer to have one company be the

borrower and that company turned all the stock to its associates.

268 Q. What were the two companies that had been borrowing money from banks prior to the time of that stock transfer?

A. Joseph E. Seagram & Sons, the Calvert Distilling Company and I believe some of the other companies.

The Court: When was that?

The Witness: Joseph E. Seagram & Sons—

The Court: (Interposing.) What year was it?

The Witness: Right up to '45, '46.

Q. (By Mr. Davis.) You say that the bankers suggested that they would prefer to lend that money to one, or extend that money to one borrower instead of more than one?

A. That is correct.

Q. Upon the transfer of the Calvert stock to the Joseph E. Seagram & Sons, Inc., what was the relation between Joseph E. Seagram & Sons, Inc. and the other three defendant companies, namely Seagram Distillers, Calvert Distilling Company and Calvert Distillers Corporation?

269 Joseph E. Seagram & Sons owned all the stock of Seagram Distillers. Calvert owned all the stock of Calvert Distillers Corporation. Calvert Distilling Company and Joseph E. Seagram & Sons were sister companies, all the stock of both companies being owned by Joseph Seagram, Limited.

Q. What company became the borrower from the banks from whom credit had previously been had?

A. Joseph E. Seagram & Sons, Inc.

Q. Which have, by virtue of that stock ownership, the same assets as the borrowing companies had previously had?

A. That is correct.

Q. Was there any other purpose in making that stock transfer to Joseph E. Seagram & Sons, Inc., than the one that you have stated?

A. None.

Q. Was there any change other than in bank borrowings, in the manner of operation of either Calvert Distilling Company, Calvert Distillers Corporation or Seagram Distillers Corporation following that transfer?

270 A. None.

Q. Was the operative control and management of Calvert Distilling Company or Calvert Distillers Corporation in any manner changed?

A. None whatever.

Q. Was the operating control of Calvert Distillers or Joseph E. Seagram & Sons, Inc. otherwise changed?

A. No, sir.

Mr. Davis: You may cross-examine.

271

Cross-Examination by Mr. Daniels.

Q. The net effect of this transaction about which you have been testifying, is that Seagram Company, Joseph E. Seagram and Sons, became the owners of all the stock of the Calvert Distilling Company?

A. That is correct.

Q. They were all governed by this Canadian corporation?

A. Owned by the Canadian corporation,

Q. Each one is a separate corporation?

A. That is correct.

Q. Had its own officers?

A. Yes, sir.

Q. Kept its own books?

A. Yes, sir.

Q. Dealt with the public separately?

A. Yes, sir.

Q. Made separate contracts with the public?

A. Yes, sir.

Q. Did the Seagram Distillers ever hold itself out to the public as having any connection with the Calvert Sales Company?

A. No, sir.

Q. And the same is true, Calvert never held itself out as having any connection with Seagram?

272

A. That is correct.

The Court: They were really competitors?

The Witness: Really competitors.

Q. Joseph E. Seagram that acquired the Calvert stock, was an operating company?

A. Yes, sir.

Q. One of the Defendants here that has a distillery in Lawrenceburg?

A. That is correct.

Q. This Distillers Corporation, Seagram, the Canadian concern, is that an operating company?

A. No, sir, a holding company.

Q. Did it ever operate in Canada?

A. No, sir.

Q. Who made the whiskey in Canada? Another subsidiary?

A. Another subsidiary up there.

Q. Never been anything but a holding company?

A. Just a holding company.

Mr. Daniels: That is all.

273

Redirect Examination by Mr. Davis.

Q. Mr. Friel, will you state whether or not the stock of the Distillers Corporation Seagram is distributed to any extent in the United States?

A. Oh, we have about ten or twelve thousand stockholders in the United States.

Q. Do you know what the approximate total number of stockholders of that corporation is?

A. My recollection is that it is about fourteen thousand.

Q. How many?

A. Fourteen thousand.

Q. How many did you say were in the United States?

A. Ten or twelve thousand.

Mr. Davis: That is all.

Recross Examination by Mr. Daniels.

Q. The controlling interest in that stock is held by the Bromphmans in Canada?

A. Correct.

274 Q. Regardless of how many stockholders they still hold the controlling shares in that Canadian company?

A. That is correct.

Mr. Daniels: Is that correct?

The Witness: Correct.

(Witness Excused.)

Mr. Paul Davis: We have some depositions.

Does the plaintiff desire the entire preface be read or only the examination?

Mr. Daniels: Are you going to read some depositions?

State the names.

Mr. Paul Davis: The defendants offer to read the depositions of Max Stryk.

(The deposition of Max Stryk was read in evidence.)

Mr. Paul Davis: If the Court please, I would like to offer at the present time, these two exhibits as attached to the deposition.

The Court: All right.

275 We will adjourn at this time.

Ladies and Gentlemen, we are going to adjourn at this time until ten o'clock in the morning. You will be permitted, of course, to separate during the night, and during the course of your separation I want to caution you not to talk about the case or permit anyone to talk with you about it or in your presence or hearing or think anything about what your verdict is going to be. In this connection, I would suggest that you not read anything in the newspapers tonight or in the morning concerning this case. Wait until the evidence is all submitted and then it will be time for you to consider what your verdict is going to be.

We will adjourn court until ten o'clock in the morning.

Whereupon the Court adjourned at five o'clock p.m. to reconvene at ten o'clock tomorrow morning.

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Indianapolis, Indiana
Friday, May 20, 1949
10:00 a.m.

The court met pursuant to adjournment and the trial was resumed as follows:

Mr. Paul Davis: If the Court please, before opening the evidence, I think it is very improbable we will finish today. I think it will take at least a day and a half of another day.

The Court: Well, use all the time that is necessary.

Mr. Davis: I was wondering whether it is the Court's pleasure to hold court on Saturday.

The Court: I will if it is necessary. I would think you should get through today.

Mr. Davis: It is possible but very improbable.

277 GEORGE FATE, a witness called on behalf of the Defendants, being first duly sworn, testified as follows:

Direct Examination by Mr. Paul Davis.

Q. Will you state your name to the Court and jury?

A. George Fate.

Q. Where do you live, Mr. Fate?

A. 3720 North Pennsylvania, Indianapolis.

Q. What is your position at the present time?

A. I am the Executive Secretary of the Indiana Wholesale Liquor Dealers Association.

Q. How long have you been in that position?

A. January, 1945.

Q. Referring to the year 1946, how many members had that association at that time?

A. It runs in my mind that there was twenty-seven, possibly twenty-eight members.

Q. Do you know whether or not there were any wholesale liquor dealers in Indiana who did not belong to the association?

278 A. At that time, no.

Q. Is that an incorporated body?

A. It is not.

Q. Do you keep records of its meetings?

A. I do, sir.

Q. I ask you, have you brought them with you pursuant to a subpoena?

A. Yes, sir.

Q. I ask you to refer to your records and state whether or not there was a meeting of that association of any character held on or including the 21st of October, 1946?

A. There was a meeting held at the Warren Hotel, a general meeting, on October 31st.

Q. Was there a meeting at the French Lick Springs Hotel previous to that?

A. No, sir.

Q. What was the nature of the gathering of the association held at French Lick?

A. We have an annual meeting of the association at which time all of our suppliers are in attendance and 279 as a matter of fact there is one on at this very moment —we have since my coming with this association, we have never held a business meeting at the French Lick Springs Hotel.

Q. That meeting or gathering at the French Lick Springs Hotel was then just a social affair?

A. Strictly a social affair at all times.

Q. Do you have any record of the members of the association who were in attendance at the French Lick meeting October, 1946?

A. No, I would not.

Q. You were present at the French Lick Springs Hotel in October, '46 at a time when many members of the association were also in attendance there, were you not?

A. That is right.

Q. Do you have any recollection, apart from your records, of what dealers or their representatives attended that meeting?

A. I would have no record, Mr. Davis. I would say that the majority of them, there is generally at least seventy-five or eighty percent of all of the wholesalers in attendance at those meetings.

Q. Do you remember that Mr. Barrett Moxley of the Kiefer-Stewart Company was there that year or not?

A. No, I could not say positively.

Q. Do you remember whether Mr. Fred Beck was there at that time?

A. I could not say positively on any of them. They could well be there but I could not say positively.

Q. Now, will you turn to your records and state whether

or not the next meeting, business meeting of the association, was held after that time? That is, after October 21st?

A. Yes, I am positive that it was October 31st, yes, September and then October, October 31st was the next meeting, sir.

Q. How did you notify members of the meeting of October 31, 1946?

A. Well, ordinarily we either send a card or call for our meetings by bulletins, telegrams or phone calls.
281 I would have no recollection, of course.

Q. Do not your files show in what manner that meeting was assembled?

A. There is no record, Mr. Davis. In all probabilities then, it would be a telephone call unless there is a mistake in the filing.

Q. You personally, or someone for you, called the several members of the association and advised them of that meeting?

A. That would be right.

Q. Well, do you have any recollection of how you called it?

A. No, I don't.

Q. Do you remember the purpose for which it was assembled?

A. If you don't mind, I will refer to see if there is anything in the records (examining the records). I see nothing of anything specifically, any specific reason why it was called. We generally have a meeting following our convention.

282 Q. Well, hadn't something happened shortly before that that was of general interest to all the members of the association that resulted in the calling of that meeting?

A. I would not recall at this time.

Q. Do you recall in transmitting notice of the meeting, to any member of the association that you advised him that that was a meeting to discuss prices?

A. No.

Q. Would you say that you did not do that?

A. That I would be most positive about because that would not be my affair.

Q. You are positive you did not mention the subject of prices?

A. I would be quite positive of that.

Q. Who was in attendance at that meeting?

A. Roll call showed that all firms were represented with the exception of Southern Liquors of Jeffersonville. I keep no record of the individual who is in attendance, the records of the firms only.

283 Q. Do you have, apart from the record, any individual recollection as to who was present at the meeting?

A. No, I would not remember, Mr. Davis.

Q. Do you recall whether or not Mr. Beck was there?

A. No, I would not. I could not recall.

Q. Who called the meeting to order?

A. The meeting was called to order by Vice President William E. Barrott.

Q. William E. Barrott is the president of Dearborn Liquors, Inc., isn't he at Lawrenceburg?

A. Yes, ~~at~~ at Aurora, Indiana.

Q. Is there any record of any action taken by that meeting in its Minutes?

A. Action of what?

Q. Of any sort.

A. We took up action on the application of a new member, Ft. Wayne Bottle Products Corporation, which brought our membership up to 100%. The secretary gave a report on the recent French Lick Convention, secretary's action regarding the Lake County Tavern owners publication was approved by the entire membership. I made a report

284 on our membership in our National Public Relations Association licensed beverages industries and that was the limit of my participation in the meeting.

Q. Well, is there any record in the Minutes of any discussion or round table talk about any subjects whatever?

A. No, sir.

Q. Any record of any remarks made by Mr. Moxley?

A. No, sir.

Q. Any records of any discussion of the subject of prices following the OPA?

A. No, sir.

Q. Were you present throughout the meeting?

A. Well, I was present throughout the meeting that I have taken my Minutes of, our formal meeting, certainly.

Q. Do you personally, recall anything that was said by Mr. Moxley at that meeting on the general subject of markup?

A. I do not, sir.

Q. By any other member?

A. No, sir.

285 Q. You have detailed from the Minutes all action of the meeting which was recorded?

A. Yes, sir.

Q. Do you recall whether any representatives of the State Alcoholic Beverage Commission were in attendance at that meeting of October 31, 1946?

A. I have no records of anyone being in attendance and if they were in attendance at our formal meeting of our Association, I am sure that they would be in the Minutes.

Q. Then, is it your judgment that neither Mr. Merton Johnston or Mr. Anderson were present at that meeting?

A. At this meeting, they would not be present at this meeting. Now, this was a luncheon meeting. There is a bare possibility they could have been present at the luncheon meeting prior to the formal opening of the meeting.

Q. Well, was there an informal meeting held in addition to the one of which you have Minutes?

A. I could not remember that, Mr. Davis.

Q. You don't remember?

A. No.

286 Q. You think it is possible there might have been?

A. Very possible.

Q. There might have been a gathering of the members that is not there recorded in your formal Minutes?

A. Could have been at the luncheon.

Q. Couldn't it have been also before or after the luncheon?

A. I would not think so, no, because the formal meetings always follow the luncheon immediately.

Q. After the formal meeting was it possible that something, that some informal discussion was had?

A. It would be possible that I would have no knowledge of it.

Q. You don't recall?

A. No, sir.

Q. When did the Board of Directors of that Association meet following the 31st of October, 1946?

A. On December 3rd.

Q. Who were the members of the Board of Directors on December 3, 1946?

A. If you will bear with me just a moment—Irvin Manthe, William E. Barrott, M. F. Olinger, William
287 H. Adams, H. R. Stout, James Bradford, Max Stryk.

Q. Will you ascertain whether or not there was a meeting of the Board of Directors at any time during the month of November, 1946?

A. There was not, sir.

Q. That is as recorded in the Minutes?

A. Well, if there were a meeting of the Board of Directors it would certainly be in the Minutes, I would think.

Q. Is there any record of any action taken by the Board of Directors at the meeting of December 3, 1946?

A. Only in the change in dues of the members.

Q. No other action taken?

A. No, sir.

Q. In the meantime had there been any meetings of the Association?

A. From October 31; on, sir?

Q. From October 31 until December 3, 1946.

A. No, sir.

Q. When had that Board of Directors been elected?

288 A. The meeting of September 12, 1946.

Q. When was the next meeting of the Association after December 3rd?

A. After December 3rd, sir?

Q. Yes, I understand there were none between October 31st.

A. I was looking at September 12th. That is the reason I asked—March 25, 1947.

Q. You have no records of any meetings of the Association between October 31, 1946 and March 25, 1947?

A. That is right, sir.

Q. Did the Board of Directors meet after December 3rd and prior to March 25, 1947?

A. They did not, sir.

Q. There is no record of any meetings whatever?

A. That is right, sir.

Q. Is there in your records, and by that I refer to all your records, any memorandum, notation or other recording of any action of any sort taken by the Association between October 31, 1946 and December 3, 1946?

A. Would you state that again?

(The reporter read the previous question.)

289 A. I would refer to any bulletins that I might have sent out during that interim. That would not be Association action, however; it would be the action of the secretary.

Q. Well, I would include action by the secretary or officers.

A. Briefly, Mr. Davis, I can give you a quick run-down of bulletins that I have sent out by captions. As an example, we on November 1st sent out a bulletin to the effect that it was possible to have a replacement on excise stamps that were destroyed.

On December 12th I sent out a bulletin, a mimeographed statement as to why we had the best law in Indiana and that was all we had in 1946.

Q. Well, I am just—I confined this substantially to the month of November and December 3rd, month of November and three days in December.

A. No, there is nothing.

Q. Is there any record in the files of the Association of any action taken by the Association or on its behalf, by any officer or designated member with reference 290 to the controversy then existing between certain of the members and the Seagram and Calvert Companies?

A. No, sir. That would not be an Association matter.

Q. Well, it did become an Association matter, informally, did it not?

A. I would not think so.

Q. You know nothing of it?

A. Yes, there is no secrets in the industry, but there was certainly no action by an association.

Q. Do you know of any action that was taken by members of the Association looking towards a settlement of that controversy?

A. No.

Mr. Paul Davis: That is all.

Witness excused.

291 MRS. MERLE WATKINS, a witness called on behalf of the Defendants, being first duly sworn, testified as follows:

Direct Examination by Mr. Paul Y. Davis.

Q. You may state your name and residence.

A. Merle Watkins, Nashville, Indiana.

Q. What position do you occupy at the present time, Mrs. Watkins?

A. Secretary to the Director of Trade Relations of the Trade Relations Department of the Alcoholic Beverage Commission.

Q. You have appeared here in response to a subpoena that you bring certain documents from the files of that office?

A. Yes.

Q. Do you have them arranged in the order in which they are called for here?

A. I think so.

Q. Have you brought with you three letters dated November 1, 1946 from Dearborn Liquors, Inc. to the 292 Commission or to the Director?

A. Yes.

Mr. Paul Davis: If the Court please, I propose to introduce a number of documents admissible from the file. I would like before we start, if we may have an understanding that having produced the documents, photostats may be substituted.

Mr. Daniels: If the documents are otherwise admissible I reserve the right to object to it.

The Court: Yes.

(Defendants' Exhibits 1(a), 1(b), 1(c) were marked for identification.)

Q. (By Mr. Davis.) I now hand you documents which you have produced which have been marked by the Reporter Defendants' Exhibits 1(a), 1(b) and 1(c) and ask you if those are a part of the files in the office of the Trade Relations Director of the Indiana Alcoholic Beverage Commission?

293 A. They are.

Q. And are there stamps found at the bottom of those, official stamps auditing and trade relations department of the Commission?

A. They are.

Mr. Davis: Defendants now offer in evidence Exhibits 1(a), 1(b) and 1(c).

Mr. Daniels: May I ask a preliminary question?

How long have you been employed by the Alcoholic Beverage Commission?

The Witness: Since April 17, 1947.

Mr. Daniels: You are in the Fair Trade Department?

The Witness: We call it the Trade Relations.

Mr. Daniels: Fair Trade Relations of the Commission. Who is the fair trades man, your superior?

The Witness: Powell F. Moore.

Mr. Daniels: How long has he been in that position?
294

The Witness: I think since the 15th of this month.

Mr. Daniels: Who preceded him?

The Witness: Mr. E. A. Hamilton.

Mr. Daniels: E. A. Hamilton?

The Witness. Yes.

Mr. Daniels: How long was he in that position?

The Witness: Since May 1, 1947.

Mr. Daniels: Are the records that you are asked to identify here records that are in the charge of the head of that department?

The Witness: Yes, I should say so.

Mr. Daniels: Your Honor, under that testimony, I am going to object to the reception of these instruments in evidence on the ground, first, as to this witness, they are the purest kind of hearsay because she was not even employed by the department at the time these letters were alleged to have been written; and secondly, that she is
295 not the proper party in any event to identify them.

She is merely the secretary and her superior officer would be the man at that time.

The Court: I don't know what they are about.

Mr. Daniels: I don't know that they have any bearing.

Mr. Paul Davis: I will state what these are about. These and other documents of similar import are the simultaneous postings of increased prices filed at or about this time by every, substantially every wholesale liquor dealer in the State of Indiana.

Mr. Daniels: I think there is no dispute that we have testified on the plaintiff's part that there were many filings of this character in November. I don't see why we should encumber the record.

The Court: Let them be read. I don't think they have a thing to do with it. Go ahead and let them be read.

(DEFENDANTS' EXHIBITS 1(a), 1(b), and 1(c) were admitted in evidence.)

296 The Court: These letters were from the plaintiff?

Mr. Paul Davis: One of them will be, your Honor.

The Court: These three.

Mr. Paul Davis: None of these three.

The Court: None of these defendants, sent to them, were they?

The Witness: Yes.

Q. (By Mr. Paul Davis.) Have you produced a letter of November 6, 1946 from Ft. Wayne Bottled Products Company?

A. Yes.

Q. Is that from the files of the State Alcoholic Beverage Commission?

A. It is.

Q. Is that stamp there appearing an official stamp of the Commission?

A. It is.

Mr. Daniels: May the record show our same objection, your Honor?

297 Q. (By Mr. Davis.) The document about which you have just testified is Exhibit marked Defendants' Exhibit 2?

A. Yes, sir.

Mr. Paul Davis: The defendant now offers in evidence Defendants' Exhibit No. 2.

Mr. Daniels: Exhibit 2 is not a letter signed by the plaintiff, is it?

Mr. Davis: No, it is not.

Q. (By Mr. Davis.) Have you a letter dated November 1st from LaSalle Liquor Corporation of South Bend, Indiana?

A. The next in order is not that one, if that is what you want.

Q. You have a letter of November 1st, 1946 from Fred A. Beck Company?

A. Yes.

(Defendants' Exhibit No. 3 was marked for identification.)

Q. I now hand you a document which has been marked Defendants' Exhibit No. 3 and ask you if that is from
298 the official files of the Commission.

A. It is.

Q. And the stamps thereon are the official stamps of the Commission?

A. They are.

Mr. Davis: Defendant now offers in evidence Defendants' Exhibit No. 3.

Q. (By Mr. Davis.) Do you have a letter of November 1st from LaSalle Liquor Corporation?

A. Yes, sir.

(Defendants' Exhibit No. 4 was marked for identification.)

Q. I hand you a document which has been marked Defendants' Exhibit No. 4 and ask you if that is from the files of the Commission.

A. Yes, sir.

Q. The stamps are the official stamps of the Commission?

A. They are.

Mr. Davis: The Defendant now offers in evidence 299 Defendants' Exhibit No. 4.

Q. You have a letter dated November 5th from the Ft. Wayne Drug Company?

A. The next in line that I have is the Midwest.

Q. The next from whom?

A. Midwest Liquors.

The Court: Is there any question but what it can be stipulated that these letters went through?

Mr. Daniels: It certainly could be as far as we are concerned?

Mr. Davis: If the Court please, the defendant has pleaded here a conspiracy among these liquor dealers and this is the proof which—

The Court: (Interposing.) Conspiracy among the defendants?

Mr. Davis: Yes, among the plaintiffs.

Mr. Daniels: There is only one plaintiff, your Honor.

The Court: Couldn't very well be conspiracy.

300 Mr. Davis: If the Court please, the answer pleads a conspiracy.

The Court: Between the plaintiff and other wholesale dealers?

Mr. Davis: And this is proof of that conspiracy they are offered in proof of that.

The Court: Why not let Mr. Daniels see them and read them in evidence?

Mr. Daniels: Perfectly willing to shorten this up; perfectly willing to come in.

The Court: It is not necessary for the witness to go over each one of them.

Mr. Davis: Well, I am perfectly willing to make blanket proof and offer them in evidence but I think their very makeup is proof of the facts alleged.

The Court: What I am saying, why take time of the

jury and the witness to go through each one? Why not take all of them and I suspect the plaintiff will admit they were sent.

Mr. Daniels: They were produced from the files of the Commission, perfectly all right.

301 Mr. Davis: Until I get this straightened out, I will take the rest of them at once; some are not letters.

(Exhibit No. 5 was marked for identification.)

Recess.

Q. (By Mr. Paul Davis.) I now hand you documents which have been marked Defendants' Exhibits 5 to 21, inclusive, and ask you if those are photostats of documents in the official files of the Alcoholic Beverage Commission Trade Relations Department.

A. They are.

Q. And the stamps on each of those are the official stamps of the Alcoholic Beverage Commission?

A. They are.

Mr. Paul Davis: The Defendants now offer in evidence Defendants' Exhibits 5 to 21, inclusive.

Mr. Daniels: Your Honor, I would like the record to show our objection to Exhibits 5 to 21, inclusive, on 302 the same grounds I have heretofore stated, and on the further ground as to this witness they are pure hearsay.

The Court: They have to do with the prices that were marked up?

Mr. Daniels: That was my understanding. We would like the record to show our objection on those grounds.

The Court: Let them be admitted.

(DEFENDANTS' EXHIBITS NOS. 5 to 21, inclusive, were admitted in evidence.)

Mr. Davis: You may cross-examine.

Mr. Daniels: No cross-examination.

303 WILLIAM H. ADAMS a witness called on behalf of the Defendants, being first duly sworn, testified as follows:

Direct Examination by Mr. Paul Y. Davis.

Q. State your name to the Court and jury.

A. William H. Adams.

Q. Where do you live, Mr. Adams?

A. Rural Route 2, Box 232, Terre Haute, Indiana.

Q. What business are you engaged in?

A. I am a partner in the firm of Highland Liquors Company, wholesale liquor and wine business.

Q. Will you speak a little louder?

A. I am a partner in the firm of Highland Liquor Company, wholesale liquor and wine dealers.

Q. Were you engaged in that business in the months of October and November, 1946?

A. I was.

Q. Is your firm a member of the Indiana Wholesale Liquor Dealers Association?

A. Yes, sir.

304 Q. Were you present at the gathering of the wholesale liquor dealers at French Lick on or about October 21st and 22nd, 1946?

A. I was.

Q. Did you attend the meeting of the Association at the Hotel Warren on the 31st of October, 1946?

A. Would you repeat that, please?

(The Reporter read the previous question.)

A. I did.

Q. Were you a member of the Board of Directors of the Association at that time?

A. I was.

Q. Did you file price increases on the distilled spirit lines handled by you with the Alcoholic Beverage Commission in the early part of November, 1946?

A. Approximately that date.

Q. How long after the meeting of October 31st, if you recall?

A. Well, I think your subpoena asked for those papers under date of November 1, 1946.

Q. Did you do that by detailed posting or by a letter?

305 A. By letter.

Q. Do you have a copy of that letter with you?

A. I have the original, yes, sir, and a copy.

Q. May I see it?

(Defendants' Exhibit No. 22 was marked for identification.)

Q. I hand you a paper which has been marked Defendants' Exhibit 22 and ask you if that document was transmitted by you to the Indiana Alcoholic Beverage Commission and returned to you by them?

A. That is correct, sir.

Q. And the stamp is the stamp of the Alcoholic Beverage Commission?

A. Approved Indiana Alcoholic Beverage Commission Trade Relations Department, Merton A. Johnston, Director, November 1, 1946.

Mr. Paul Davis: Defendants offer in evidence Defendants' Exhibit No. 22.

Mr. Daniels: May I see it?

We want the record to show the same objection to
306 this letter as to the Exhibits which have already gone in.

The Court: Who is it from?

Mr. Davis: From another liquor dealer, to the Commission, same import as the others.

Mr. Daniels: Same objection.

(DEFENDANTS' EXHIBIT NO. 22 was admitted in evidence.)

The Court: I would like to read one of those letters.

(Mr. Davis read the letter from Highland Liquors, Terre Haute, dated November 1, 1946, which is Defendants' Exhibit No. 22.)

Q. (By Mr. Davis.) Mr. Adams, that was not a usual way of filing new price schedules with the Alcoholic Beverage Commission, was it?

A. I could not answer, Mr. Davis. When I entered the business we were under OPA and that was my first experience other than under OPA so I could not give you an answer to that. I don't know.

Q. Had you, from any official source, any information
307 tion that that type of filing would be accepted in this instance?

A. Yes, sir.

Q. From whom did you receive that information?

A. From Mr. Merton Johnston, the Trade Relations Director.

Q. When did you receive that information from Mr. Johnston?

A. Approximately November 1st in his office.

Q. Well, to refresh your recollection, did you hear Mr. Johnston say that, or in substance that, at a meeting of the Association at the Hotel Warren on the 31st of October, 1946?

A. Mr. Davis, I stand on my rights. I refuse to answer that. I might incriminate myself.

Q. Do I understand you, Mr. Adams, that you will not testify as to what was said at the meeting of the Association on October 31, 1946 on that ground?

A. That is correct because it might tend to incriminate me.

Q. Mr. Adams, I believe you testified that you were 308 at French Lick a short time before that at a social gathering of the Association.

A. That is correct.

Q. While there at French Lick, did you have any discussion with any other wholesale liquor dealer of Indiana or his representative, concerning markups to be filed after OPA controls were abolished?

A. No, I did not. In fact the first I knew of the abolishment of OPA was, I think, the 23rd day of October after I had returned to my home.

Q. Well, but prior to that time?

A. No discussion of any kind.

Q. Had you had any discussion with any other?

A. No, sir.

Q. Between October 23rd and October 31st had you met with or talked to any other wholesale liquor dealer or his representative on that subject?

A. I think undoubtedly because it was a subject of utmost importance.

Q. Well, I will ask you specifically if you had discussed that question or heard it discussed by Mr. Moxley of 309 Kiefer-Stewart?

A. Mr. Davis, I refuse to answer. I am not going to do anything that would tend to incriminate myself.

Q. Have you discussed that subject with Mr. Fred Beck of The Fred Beck Company?

A. The same answer, Mr. Davis, I am not going to do anything that would tend to incriminate myself.

Q. Had you discussed that subject with Mr. Jules Fansler?

A. We are going right down the same alley. I am not going to testify as it might incriminate me.

Q. Had you discussed that subject with Mr. James Bradford?

A. Same answer.

Q. I will ask you if, subsequent to the new price filings effective November 6, 1946, you met with any other wholesale liquor dealers at the Indianapolis Athletic Club during the month of November, 1946.

A. I refuse to answer.

Q. Beg pardon?

A. I am not going to incriminate myself, Mr. Davis.

Q. You mean you refuse to answer the question?

A. Repeat the question.

310 Q. The Court: Whether you met with any other wholesale liquor dealers at the Athletic Club.

The Witness: Yes, I attended a meeting.

Q. (By Mr. Davis.) When was that meeting? /

A. To the best of my knowledge, it was ten days to two weeks following the 1st of November.

Q. How many other dealers were present at that meeting?

A. There were a number of people there—how many houses were represented, I would not know.

Q. Well, can you state whether or not those present were distributors of either Seagram or Calvert products or had been prior to November 6?

A. Oh, I think undoubtedly, yes.

Q. Was there anyone at the meeting who had not been a distributor of Seagram or Calvert products?

A. To name names, I could not. I most certainly think that there were.

Q. Well, was that meeting to which you refer, a meeting of members of the Association or of the Board of Directors of the Association?

311 A. No, I don't know, Mr. Davis. It could have been either or both. I don't know.

Q. I will ask you to state whether or not you discussed or heard discussed in your presence at that meeting at the Athletic Club, the question of whether or not the dealers present and other dealers should refile their prices and go back to the old OPA prices?

A. I refuse to answer the question.

Q. On what ground?

A. Incrimination of myself.

Q. Now, did you attend the meeting of wholesale liquor dealers at the Indianapolis Athletic Club or elsewhere on or about the 3rd of December, 1946?

A. Well, Mr. Davis, I think there were two meetings at the Warren and one at the Athletic Club; as I remember it the Athletic Club meeting was about mid-November. The date of December 3rd escapes me.

Q. Did you hear Mr. Fate testify that there was a directors' meeting on the 3rd of December?

A. There was a meeting late in October, one in the middle of November and probably the meeting at the 312 Warren was, approximately—

Q. (Interposing.) Do you remember?

A. There were three meetings and about two weeks apart, as I remember it, so that would about work out, the last of October, the middle of November and the first of December.

Q. Well, at the meeting, at the third of those three meetings, did you participate in any discussion as to making a refiling of your prices to abolish part of the markup you had taken in early November?

A. I refuse to testify on the basis of incrimination of myself.

Q. Do you remember anyone else that was present at any of those meetings that I have inquired about? Was Mr. Moxley of Kiefer-Stewart present at any of them?

A. Well, I am sure he was. To say which meeting or all of them, that is calling on memory.

Q. Do you know whether he was present at the October 31st meeting?

A. I think so.

Q. Was he present at the meeting which you have testified was held sometime in mid-November?

313 A. Well, I would think so, but I can't definitely say so.

Q. You can't say positively whether he was or not?

A. Well, that is calling on memory of several years.

Q. Well, was any other representative of Kiefer-Stewart Company present at any of those three meetings that you have spoken of?

A. Well, I think probably everybody in the business was represented at all three of them.

Q. Even at the December 3rd meeting?

A. I think there were three meetings and I think the industry generally was represented at all of the meetings.

Q. I will ask you if at all three of those meetings there wasn't discussion about the new markups which were filed November 6th and subsequent to that what should be done with them.

A. I refuse to answer on the basis of incrimination.

Mr. Davis: I think that is all, Mr. Adams.

314

Cross-Examination by Mr. Daniels.

Q. Mr. Adams, you were a member of the Board of Directors of the Indiana Wholesale Liquor Dealers in October, November and December, 1946?

A. That is correct.

Q. Who were the other members of that Board?

A. I think Mr. Irvin Manthe was a director and president of the Association. Mr. Will Barrott was the vice president; Mr. Fate, of course, was not a member of the Board, but he was the executive of the Association; myself—I don't remember, Mr. Daniels, anybody else.

Q. You can't remember who those directors were except the ones you have named. Is that right?

A. That is right.

Q. Mr. Moxley was not a director?

A. I don't know.

Q. You can't even remember that, that he was not a director?

A. I don't know.

Q. Mr. Lutz was not a director, was he?

315 A. I don't know.

Q. In fact, there wasn't any member of the Kiefer-Stewart organization who was a director of the Indiana Wholesale Liquor Dealers Association?

A. I can't answer that. I don't know, Mr. Daniels.

Q. You can't remember who the directors were, there were only five directors, weren't there, on that Board?

A. I could not tell you, sir.

Q. You want this jury to understand you can't remember who the other directors were? Is that right?

A. Well, that is what I have testified to.

The Court: Were you a director?

The Witness: That is right.

The Court: You don't remember any of the others?

The Witness: I don't sir.

Q. (By Mr. Daniels) If neither Mr. Moxley nor any other member of the Kiefer-Stewart Company was a director, he would not have been at the directors' meetings, would he?

316 A. The directors' meetings of this Association are—

Q. (Interposing) Just answer the question, yes or no.

A. Will you repeat the question, please?

Q. If neither Mr. Moxley nor Mr. Lutz nor any other member of the Kiefer-Stewart organization was a member of the Board of Directors of the Indiana Wholesale Liquor Dealers Association, they would not have been present at these meetings of the Board of Directors to which you have been testifying?

Mr. Paul Davis: To which the defendants object for the reason it is purely argumentative.

The Court: Overruled. Go ahead.

The Witness: Sir?

The Court: Go ahead.

The Witness: You want me to answer?

The Court: Yes.

A. Very probably, the meetings of the directors were informal.

Q. (By Mr. Daniels) I am asking you to answer that question yes or no.

317 A. I would say yes, they could have been in attendance.

Q. I didn't ask that. I say would somebody not a director—

A. (interposing) Oh, most certainly.

Q. Do you have any recollection that Mr. Moxley was present at any of those meetings of the Board of the Indiana Wholesale Liquor Dealers?

A. I don't know.

Q. Do you have any recollection that Mr. Lutz was present at any of those meetings you have testified to of the Board of Directors of the Indiana Wholesale Liquor Dealers Association?

A. There was one meeting of the Board of Directors and probably thirty people there.

Mr. Daniels: I move to strike the answer out and the witness be admonished—

The Court: (Interposing) Answer, if you can.

Q. (By Mr. Daniels) Do you have any recollection of Mr. Moxley or Mr. Lutz?

A. No, sir, there was but one meeting of the Board.

318 Q. You just testified in response to Mr. Davis's questions there were two. Which is it?

Mr. Paul Davis: No.

The Witness: I don't think that was the testimony, your Honor.

Q. (By Mr. Daniels) There was one meeting on October 31st of the whole Association?

A. That is right.

Q. Mr. Moxley was present at that, wasn't he?

A. I remember that, yes, sir.

Q. You don't remember he was present at any of the other meetings, do you?

A. No, I don't.

Q. You don't remember Mr. Lutz was present at any other meeting, do you?

A. No.

Q. Nor any other representative of Kiefer-Stewart?

A. I don't know about that.

Q. What is your main line of whiskey products that you sell, Mr. Adams?

A. Today or when?

319 Q. As of today.

A. As of today?

Q. Yes.

A. Probably our leading seller is Seagram 7 Crown.

Q. That was true back in November 16, 1946, too, was it?

A. It is universally true, yes, sir.

Q. You say probably. There is no probable about it.

A. It is, oh, yes.

Q. It is your leading seller?

A. Oh, yes.

Q. If you lost that line you would be pretty hard put to it to make any money?

A. No, I don't think so. It would be a pinch, yes.

Q. You would lose a substantial amount of your profit-making business if you lost the Seagram line, wouldn't you?

A. Oh, undoubtedly.

Q. Did you talk with any representatives of Seagram before you took the witness stand any time in the past three or four weeks, Mr. Adams?

A. Oh, certainly, yes, sir.

Q. Whom have you talked with?

320 A. Well, I talked to Mr. Davis.

Q. Who else?

A. The gray-haired gentleman sitting directly back of him, Mr. Lynn, Mr. Friel.

Q. Who is Mr. Friel?

A. I think he is the treasurer of the Seagram Company.

Q. Who else?

A. Mr. Behrman.

Q. Who is Mr. Behrman?

A. He is their Indiana State representative.

Q. For whom?

A. Seagram.

Q. Whom else have you talked with of the Seagram-Calvert organization?

A. Well, you mean socially or—

Q. (Interposing) I mean—

A. (Interposing) Or in any respect?

In the last month before you took the witness stand here this morning.

A. Well, I see General Schwengel. I talked to him. I talked to Mr. Grube, Mr. Schwalb, Mr. Teece, Mr. Fischel.

321 Q. Those are all representatives of either Seagram or Calvert, are they not?

A. That is right, yes, sir.

Mr. Daniels: That is all.

Redirect Examination by Mr. Paul Y. Davis.

Q. You talked with Mr. Barrett Moxley, also, didn't you?

A. Well, I have talked to pretty nearly everybody in the building, in the audience.

Mr. Daniels: Let's distinguish. I am not talking about social conversation. You talked with the attorneys of the defendants about this case?

The Witness: Oh, that is right, only the attorneys.

Mr. Daniels: That is what I mean. I don't mean your social talk, but you did discuss this case with these attorneys?

The Witness: These three gentlemen.

322 Mr. Daniels: Before you took the witness stand?

The Witness: Yes, sir.

Mr. Daniels: That is all.

Witness Excused.

323 FRED A. BECK, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination by Mr. Paul Y. Davis.

Q. You may state your name to the Court and jury.

A. Fred A. Beck.

Q. What is your connection with The Fred A. Beck Company?

A. President.

Q. Were you president of the Fred A. Beck Company in 1946?

A. Yes, sir.

Q. Continuously since?

A. Yes, sir.

Q. The company was then and is now engaged in the wholesale liquor business?

A. Yes, sir.

Q. You filed new price schedules after OPA was established—was withdrawn, I mean, OPA control?

A. Yes, sir.

324 Q. Do you recall when you filed that new price schedule?

A. The filing, I don't have a record of, but I filed a letter with the Alcoholic Beverage Commission, the actual filing of the prices I could not find.

Q. I call your attention to a paper which has been marked Defendants' Exhibit 3 and ask you if you recognize that as the copy of your letter?

A. Yes, sir.

Q. Mr. Beck, that was not the usual way of filing new price schedules, was it?

A. Well, no, it was not the usual way of doing it because we had never filed prices in that manner before.

Q. When did you determine to file a letter taking a blanket markup on your entire line of merchandise in that form, rather than pursue the usual policy?

A. Well, I can't give the exact date, but Mr. Merton Johnston wanted it that way.

Q. When did he tell you that he wanted it that way?

A. Well, I can't remember the date. It was prior to—

Q. (Interposing) You remember that OPA price controls had been withdrawn on the 23rd of October preceding that, do you not?

325

A. Approximately that date.

Q. When OPA controls were withdrawn, you had a legal right to file any sort of new prices that you determined upon, did you not?

A. That is true.

Q. When did you determine, or your company determine, to file a schedule with overall markup including the State and Federal tax which you had been prohibited from taking the markup?

A. Sometime between October 23rd and the date of the letter, I don't recall just when.

Q. State, if you know, why you waited until November 1st?

A. Well, I don't recall other than, first of all we would have to get authority from the Fair Trades Relation Department of the Indiana Alcoholic Beverage Commission.

Q. Well, you had to get authority from the Trade Relations Department before you could use the price, but you did not have to get permission to file and apply for that new price, did you?

326 A. Yes, I think that is their method, Mr. Davis.

Q. What regulation requires that?

A. I really don't know the regulation, but we were required to file prices on everything.

Q. Well, Mr. Beck, the letter you sent November 1st was a request for authority to increase your prices, was it not?

A. That is right.

Q. You could have filed such a request at any time after October 23rd, could you not?

A. Not unless a request of that sort had been filed, unless it had the approval of the man in charge.

Q. Well, that approval was given to all wholesale liquor dealers at their meeting of October 31st, was it not?

A. The approval was given by Mr. Johnston at a luncheon. It was not a meeting as far as I can remember.

Q. Where was that luncheon held?

A. At the Warren Hotel.

Q. Was there any discussion at that luncheon or at the meeting following it, about what markups were going to be filed by the wholesale dealers?

327 A. Not that I remember.

Q. Do you remember anything that was said there about the amount of markup that anyone was going to take?

A. No, sir.

Q. You remember nothing of that kind?

A. No.

Q. Do you remember Mr. Moxley announcing that Kiefer-Stewart was going to take a 15% markup overall?

A. I don't recall that, no, sir.

Q. I will ask you if you at any time that day of October 31st or within the two weeks prior to that time, you had any discussion with Mr. Barrett Moxley about the proper markup to be taken by wholesale liquor dealers after they were released from OPA control?

A. I can not remember during that particular period whether I discussed anything with Mr. Moxley or not.

Q. Well, you do remember at some time, discussing that subject with Mr. Moxley, do you not?

A. No, I cannot say that.

Q. I will ask you if you, Mr. Moxley and Mr. 328 Fansler and Mr. Bradford and perhaps others, did not, some one or all of you, get together and discuss that subject, namely the markup to be taken after OPA control was removed?

A. Definitely not, in a body. I may have discussed it individually with any one of the gentlemen you have mentioned, but definitely not in a body.

Q. I will ask you if you and Mr. Adams did not have such a discussion.

A. I don't recall of discussing it with Mr. Adams.

Q. Did you make any announcement either to the luncheon meeting or the formal meeting of the Wholesale Liquor Dealers Association at the Hotel Warren on October 31st?

A. I am positive I did not.

Q. Did anyone on your behalf, that is on behalf of your company or representing your company?

A. Do you mean make announcement as to the 15%?

Q. Well, as to what markup you were going to take or as to what markup you thought ought to be taken.

A. No, sir, no one would have authority but myself.

Q. Well, did you yourself, at any time prior to the 329 first of November, learn that any other wholesaler was going to mark the distilled spirit items up precisely 15% overall?

A. There was discussion for several years as to the markup on the tax of 1944 and Federal Tax of 1944 and the State Tax of 1945. As a matter of fact, we filed a brief with the OPA administrator in Cleveland, Ohio, asking for re-

lease and that was probably in the minds of everyone at the time.

Q. The question, Mr. Beck, was whether or not you had any information as to whether any other wholesaler was going to take precisely that same markup.

A. Oh, that would have been very possible, yes, Mr. Davis.

Q. Well, don't you have recollection as to what you knew or did not know on that subject at the time?

A. Well, I knew that I definitely wanted 15% markup myself.

Q. I will ask you if you did not know, when the meeting terminated at the Hotel Warren, that substantially all the wholesalers in Indiana were going to take precisely the identical markup which you took?

330 A. I assumed that after this luncheon we had.

Q. You assumed that they would?

A. That is right.

Q. What was the basis of that assumption?

A. Because of the fact that Mr. Johnson of the Trade Relations Department asked us to file in this manner if they were going to file.

Q. You say he asked you to file in that manner; did he ask you to file that precise schedule?

A. No, sir.

Q. Well, what I am getting at is how you arrived at that precise figure.

A. Because I felt that the markup as set by the Office of Price Administration was a fair and equitable markup; however, it was not as great as our historical markup at the beginning of this business.

Q. Well, as a matter of fact, your historical markup had been 17½% overall, had it not?

A. That is right.

Q. And Mr. Moxley, at one time, advocated a return to that after OPA withdrawal, did he not?

A. No, I don't recall Mr. Moxley talking about it.

331 Q. Do you ever recall having any discussion with anyone on that subject?

A. Yes, I did.

Q. Who?

A. I have discussed—Mr. Fansler and I discussed it.

The Court: Talk a little louder.

A. Mr. Fansler and I discussed the 17½% markup and discussed our costs etc.

Q. Where did you and Mr. Fansler discuss that?

A. Oh, it could have been most any place.

Q. Where was it actually prior to November 1st?

A. I can't remember where it was, Mr. Davis.

Q. Did you discuss that with Mr. Fansler down at French Lick?

A. No, sir.

Mr. Daniels: I am going to object to this line of questioning. It was hearsay, it was not in the presence of the plaintiff or plaintiff's representatives. I don't want to be too technical but I do think we are getting far
332 afield.

The Court: There has been some testimony on your side. I don't see where this is helping any.

Mr. Davis: The purpose of the testimony, if I can get anywhere with this witness, I will concede we have made a prima facie case that all of these dealers conspired together to mark up the exact amount.

The Court: I don't think you have a prima facie case. You charged in your answer in the second paragraph. That is different from making a case. This witness is not helping anyone.

Mr. Davis: As to this particular question, I am entirely in difference with your Honor, but I don't want to concede the validity of the objection.

The Court: You don't need to concede anything. We will rule as we see fit.

Mr. Davis: I will ask the question.

333 Q. (By Mr. Davis.) Did you discuss that subject with Mr. Bradford shortly prior to November 1st, 1946?

Mr. Daniels: Same objection.

The Court: Objection sustained.

Unless the plaintiff was there and had some part in it it would not be binding on the plaintiff if all the rest of the wholesalers discussed it.

Mr. Paul Davis: Your Honor, I have proved the plaintiff did the same as every other wholesale dealer.

The Court: Well, that is a question for the jury.

Mr. Davis: The evidence is in, that is undisputed.

The Court: Any other questions?

Q. (By Mr. Davis.) Did you attend the meeting of wholesale liquor dealers, a gathering at the Indianapolis Athletic Club on or about the middle of November sometime in 1946?

A. I don't remember the date, but I have attended
334 meetings there at the Athletic Club, it seems to me.

Q. The particular time to which I refer, please.

A. Very possible that I did attend a meeting at that
time.

Q. Did you go to New York to the Army and Navy foot-
ball game that year?

A. I did, sir.

Q. Did you call upon the Seagram officials at that time?

A. Yes, sir, Mr. Fischel was my guest there at the foot-
ball game.

Q. You were at that time representing the Indiana
Wholesalers in their controversy with Seagram over the
price increase, were you not?

A. No, I would not say that.

Q. What is it?

A. I would not say I represented the Indiana Wholesale
Liquor Dealers.

Q. You were representing the Seagram Distributors?

A. Not officially, no, I was not.

Q. Well, whether officially or not, you were there to
speak for all of them, were you not?

335 A. I was there to speak for myself and that was all.
Mr. Davis: I think that is all.

Cross-Examination by Mr. Daniels.

Q. You spoke of asking the OPA, Mr. Beck, sometime
during OPA, to give you relief, by allowing you to charge
your 15% markup to the three dollar additional Federal
Tax and one dollar additional State Tax. Did the OPA
give you that relief?

A. No, sir.

Mr. Daniels: That is all.

The Court: That is all.

Witness excused.

336 JULES FANSLER, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination by Mr. Paul Y. Davis.

Q. You may state your name and residence.

A. Jules Fansler, Indianapolis.

Q. Mr. Fansler, were you engaged in the wholesale liquor business in Indiana in October, 1946?

A. I was.

Q. With what company?

A. National Liquor Corporation.

Q. Did that corporation file a price change, taking an overall markup with the Alcoholic Beverage Commission on or about November 1, 1946?

A. Yes, sir.

Q. Who made the decision in your company?

A. I did.

Q. To take that particular markup?

A. I did.

Q. Before making that decision, did you discuss that question with any other wholesale liquor dealers?

337 A. I imagine so.

Q. Well, did you?

A. I would say yes.

Q. Did you discuss it with Mr. Moxley?

A. Yes, sir.

Q. Where?

A. Oh, various places probably.

Q. Did you have discussion on that subject with Mr. Moxley at French Lick at the social meeting, about a week before that?

A. Why, I could not answer that.

Q. Well, do you remember whether or not you talked about your post-OPA prices with Mr. Moxley or anyone else while you were down there at French Lick?

A. I probably did with a good many of them, yes.

Q. And do you remember any discussion down there with Mr. Bradford on that subject?

Mr. Daniels: If the Court please, I am going to object to any of these discussions unless the witness says they were in the presence of the plaintiff, as not binding
338 and not relevant.

The Court: I thought we ruled on that.

Mr. Daniels: That you did, your Honor. That is why I am objecting.

The Court: Limit your discussion to anything that took place in the presence of these plaintiffs. Objection sustained.

Q. (By Mr. Davis.) Did you discuss that in Mr. Moxley's presence or with Mr. Moxley and Mr. Bradford?

Mr. Daniels: Where?

Q. (By Mr. Davis.) At any time.

A. Not with Mr. Bradford and Mr. Moxley together, no, sir.

Q. Did you discuss it with Mr. Beck and Mr. Moxley together?

A. No, sir.

Q. What, if anything, did Mr. Moxley say to you about the proposed markup of Kiefer-Stewart Company after OPA?

339 Mr. Daniels: The plaintiff objects because the witness said he did not remember he talked to Mr. Moxley. He said probably he did.

The Court: Go ahead and answer.

A. Mr. Moxley advocated 15% on our laid down costs. He said that openly and individually.

Q. He said that to you?

A. Yes, sir.

Q. What did you say?

A. I don't recall what I said. I just remember that that was Mr. Moxley's statement.

Q. Weren't you advocating 17½%?

A. I may have been.

Q. But you finally decided to go along with all the rest at 15%?

A. I finally filed 15%.

Q. You could not afford to file any greater than the rest of them?

Mr. Daniels: I object, your Honor—argumentative.

The Court: Objection sustained.

340 Q. (By Mr. Davis.) Mr. Fansler, the remarks of Mr. Moxley that you have just testified, were they made at the October 31st meeting at the Warren Hotel?

A. He made such a statement at that meeting, yes, sir.

Q. He had made it to you previously also?

A. Yes, sir.

Q. And did you make any remarks at that meeting?

A. No, sir.

Q. Who else at that meeting of October 31st discussed the question of prices?

A. Of prices?

Q. Yes, that is of the new markup.

A. I think Mr. Moxley was the only one.

Q. You mean that Mr. Moxley's speech at that meeting in which he announced Kiefer-Stewart's markup was the only reference to that subject made by anyone else?

A. Well, Mr. Hagemeyer spoke at that meeting but not about prices, but cautioned the wholesalers as to what their rights were under the Robinson-Patman Act and some other acts I am not familiar with, and Merton Johnston addressed the meeting and Mr. Moxley, the only three that I recall.

Q. What did Mr. Merton Johnston say at that meeting?

A. He explained the method by which after OPA went off, we could file without filing entire price lists by letter and getting five-day approval of it before putting any changes in price into effect.

Q. Did he advocate or suggest any particular or precise markup?

A. No, sir.

Q. Did he say anything on that subject?

A. No, sir.

Q. Did you attend the meeting at the Indianapolis Athletic Club of certain wholesale liquor dealers on or about—oh, somewhere between the 8th to the 12th of November, 1946?

A. I probably did but I could not say positively.

Q. Do you remember such a meeting at which the action to be taken in the light of the Seagram suspension of shipments was discussed?

Mr. Daniels: If the Court please, I object to the question unless the witness says that some representative of the plaintiff was there. It would not be binding upon the plaintiff.

The Court: Go ahead and answer.

A. I would not remember such a meeting.

Q. (By Mr. Davis.) Do you remember no such meeting?

A. No, sir.

Q. Do you remember a meeting anywhere where it was proposed by you or any other liquor dealer that you should

take 15% on part of these new taxes and not on the rest of it?

A. No, sir.

Q. Ever make that proposal to anybody?

A. May have individually but not at any meeting.

Q. What was the answer?

A. I may have to individual wholesalers, but not at any meeting of wholesalers.

Q. Did you ever make that suggestion to Mr. Moxley?

A. I don't recall whether I did or not.

Q. Mr. Lutz?

A. I would not know.

343 Q. Were you at the meeting at the Athletic Club or at the Hotel Warren December 3, 1946?

A. If that was the directors' meeting, I was not because I was not a director of the Wholesalers.

Q. Well, wasn't there a meeting at which others than directors were present?

A. There may have been.

Q. Do you recall being at such a meeting?

A. I probably was there if they had a Wholesalers meeting. I attended almost every one.

Q. Do you recall at that meeting, whether Mr. Moxley or Mr. Lutz was present?

A. I don't recall the meeting positively. I remember the meeting, the general meeting that we had that I have referred to before.

Q. Don't you remember a meeting at which it was proposed that you abandon the new markup and go back to the OPA?

Mr. Daniels: I object. As far as the plaintiff is concerned it is pure hearsay.

The Court: Go ahead.

344 (The Reporter read the previous question.)

A. No, sir.

Q. (By Mr. Davis.) You did refile prices sometime in the winter going back to the OPA formula, did you not?

A. After the November filing?

Q. Yes.

A. Yes, sir.

Q. Do you remember about when that was?

A. As I recall, it was sometime in January, maybe the first of February.

Q. Do you recall whether or not you made that filing

simultaneously with all others, as this November 6th was made?

A. No, sir, I don't.

Q. You don't know?

A. No, sir.

Q. You knew, of course, that everybody else was going to file the same thing on November 1st, did you not?

A. I didn't know what the others were going to file.

Q. You did not know?

345 A. No, sir.

Q. Mr. Fansler, if you had filed yourself and any one of your competitors in this locality had failed to file one, you would have been out of luck?

Mr. Daniels: I object to the question, purely argumentative.

The Court: Objection sustained.

Mr. Davis: You may cross-examine.

Mr. Daniels: We have no cross-examination.

Witness excused.

346 MERTON A. JOHNSTON, a witness called on behalf of the Defendants, being first duly sworn, testified as follows:

Direct Examination by Mr. Paul Y. Davis.

Q. You may state your name to the Court and jury.

A. Merton A. Johnston.

Q. Where do you live?

A. 3730 North Pennsylvania, Indianapolis.

Q. In what business are you at present engaged, Mr. Johnston?

A. I am in the wholesale liquor business at Jeffersonville, Indiana.

Q. What was your position in October and November of 1946?

A. I was trade relations director of the State of Indiana for the Alcoholic Beverage Commission.

Q. You are here in response to a subpoena?

A. I am.

Q. Were you present at a meeting of the Indiana Wholesale Liquor Dealers Association on the 31st of October, 1946 at the Hotel Warren?

347 A. Yes, sir.

Q. Were you present throughout the meeting?

A. I was invited to a luncheon. I am not sure what transpired after I left.

Q. Well, it has been testified here that you made certain remarks to the meeting, or to the gathering. Do you recall having done so?

A. I do. I requested that—in fact, I asked to speak to the group because it was a chance to talk to them all in a body, and advise them on the new method that I wished to have employed in posting their prices.

Q. You did advise them on that subject?

A. I did.

Q. Now, while you were present at the meeting, did you hear anyone else address the meeting?

A. Yes. I merely—after the meeting, people were just getting up from the table. I believe I heard Mr. Moxley make a statement, but other than that, I don't recall anyone saying anything.

Q. Had you been informed that that gathering had been called for the purpose of considering the new prices?

A. No, sir. When you say new prices, I had talked
348 to different ones about filing new prices on a new basis. It had nothing to do with the per cent of markup. I wasn't interested in that. I was interested in reverting to the methods that the forms were set up for in '41 when I designed them, and they had been used through OPA in a way that was a make-shift arrangement, and very cumbersome in the office, and I wanted merely to revert to the method that we had of taking the overall cost, and applying a given markup, whatever that might be, and coming out with an end result.

Q. You didn't suggest any amount to be used as a markup?

A. I did not.

Q. You did tell them at that meeting that you would accept and approve new filings which simply announced what the markup was to be over all?

A. That is right.

Q. Without detailed calculation on each one?

A. That is correct. That was to be followed, of course, as soon as convenient with the regular price posting on the proper form. The change entailed too much work
349 on the part of some of the larger wholesalers because those forms are really difficult to make out, and take

the taxes off, the Federal taxes on one basis, the basis of proof gallons; the state taxes on the basis of wine gallons, and only a part of the Federal tax could be marked up and only a part of the state tax could be marked up, so that now OPA was out of the way, I asked that we return to the former method of filing.

We could not have handled the detail in our office of all of the wholesaler if I had asked that all of them come in there at once and line up and say, "We go from here." We could not possibly have checked and O.K.'d all of the price postings that would have come in at that time, and yet we did want them to move off at the same time.

Q. How did you know that anybody wanted to change a price?

A. I didn't ask them to change the price. I asked them to change the method.

Q. What reason did you have to anticipate there 350 would be a lot of new price filings?

A. I knew that there had been changes in the way of taxes; I knew, too, that formerly there had been an overall markup of $17\frac{1}{2}\%$, or something near that, but with a chain of discounts which come out to approximately the same end result that a 15% markup would have arrived at to the wholesalers, and it didn't make any difference to me, I wanted simplification. That is all I was asking.

Q. The substance of your request was that they, in any future filings, they file them on an overall basis rather than on a piecemeal basis?

A. Exactly.

Q. You didn't hear anyone else speak on the subject of prices at that meeting?

A. I did not.

Q. Did you hear Mr. Moxley's speech?

A. I did. I know that he made a statement, something about, "I don't know what the rest of the crowd is going to do, but we are going back and figure our prices and send in a letter accordingly." That is the statement I heard him make.

351 Q. Did he announce on what basis?

A. No, he did not, not to my knowledge.

Q. Did anyone else so announce?

A. Not that I heard.

*Mr. Davis: That is all.

Cross-Examination by Mr. Daniels.

Q. Was there another representative of the Alcoholic Beverage Commission present at that October meeting, Mr. Johnston?

A. I believe Mr. Anderson.

Q. Was there any representative of the Attorney-General's Office present?

A. I think Wilbur Donner was there. I am not sure. My recollection of that is not so good. Sometimes—the Commission usually are invited to these luncheons, and not all of them would attend each one—sometimes only one or two or three, whatever it might be. I could not say, but I do think that Commissioner Anderson was present, and I also think Wilbur Donner.

Q. Who was he? Deputy Attorney-General assigned to the Liquor Department?

A. That is right.

Witness excused.

353 SAMUEL BERNBACH, a witness called on behalf of the Defendants, being first duly sworn, testified as follows:

Direct Examination by Mr. Kiernan.

Q. Mr. Bernbach, what is your occupation?

A. I am Southern Illinois State Manager for Seagram Distillers Corporation.

Q. Where do you reside?

A. Springfield, Illinois.

Q. How long have you resided there?

A. Intermittently for the last seven years.

Q. What was your occupation in the months of October, November and December, 1946?

A. I was Indiana State Manager for Seagram Distillers Corporation.

Q. Now, what were your functions as such State Manager for Seagram Distillers Corporation?

A. Well, I had twelve distributors that I contacted periodically, sometimes every week, every two weeks or every

month. I had to follow the routine of our organiza-
 354 tion in the setting up of allocations of merchandise to
 every distributor and we maintained master report
 records on how that merchandise was sold, etc.

Q. What were the names of the distributors who acted
 on behalf of Seagram Distillers Corporation?

A. In East Chicago, it was Midwest; in Gary, it was
 Standard; in South Bend it was General Drugs; in Evans-
 ville—it was Ft. Wayne, Bob Shambaugh; in Indianapolis
 it was National Liquor, Fred Beck, Kiefer-Stewart,
 Mooney Mueller Ward. In Evansville it was Conard; in
 New Albany it was Reliable. I think there were twelve
 distributors in the Seagram picture.

Q. Now, did you attend the convention of the Indiana
 Wholesalers in French Lick in the month of October, 1946?

A. I did.

Q. Did you meet any of the representatives of your
 distributors at that convention?

A. I met them all.

Q. And what was the general nature of the discus-
 355 sion that you had without going into detail?

Mr. Daniels: I am going to object to that, your
 Honor unless it ties in with the plaintiff.

Q. (By Mr. Kiernan.) Tell me what you said to Mr.
 Moxley, Mr. Lutz or any representative of the Kiefer-
 Stewart Company.

A. Well, on October 23rd in French Lick?

Q. Yes.

A. Oh, I don't recall anything particular at French
 Lick.

Q. All right, that is all. Do you recall October 31st,
 1946?

A. Yes.

Q. Do you recall that by that time the OPA price con-
 trol had been withdrawn in respect to alcoholic beverages?

A. Yes, sir.

Q. What, if anything, occurred on the 31st day of Octo-
 ber, 1946?

A. In the late afternoon or early evening, while I was
 in my office, I got a telephone call from Bob Shambaugh.
 He said—

356 Mr. Daniels: (Interposing.) Your Honor, I ob-
 ject to this testimony—purely hearsay.

Q. (By Mr. Kiernan.) All right. As a result of having

received that telephone call from Mr. Shambaugh, did you do anything?

Mr. Daniels: Same objection.

The Court: Well, if it pertained to these plaintiffs.

Mr. Daniels: Mr. Shambaugh, he testified, was a distributor in Ft. Wayne.

The Court: Any connection you had with this plaintiff.

Mr. Paul Y. Davis: If the Court please, this particular question does not call for the conversation.

The Court: Objection may be sustained.

Mr. Paul Davis: If the Court please. I would like to make an offer to prove.

The Court: All right.

Mr. Paul Y. Davis: Defendants offer to prove and say that the witness will testify, if permitted to answer 357 the question, that Mr. Shambaugh told him that there had been an agreement among the wholesalers to go to a 15% overall markup on all distilled alcoholic beverages.

Q. (By Mr. Kiernan.) Now, Mr. Bernbach, did you call at the office of the State Alcoholic Beverage Control Board?

A. I did.

Q. In the early part of November?

A. I did.

Q. Did you examine the various papers which have been marked Defendants' Exhibits 1 to 21, inclusive?

A. I don't believe I examined them. (Examining the Exhibits.)

Oh, yes, yes, I remember looking over some of these. I don't recall looking over all of them but I know I looked at some of them.

Q. Now, as a result of having looked at those papers, did you do anything?

A. Well, asked—

358 Mr. Daniels: (Interposing.) Well, if the Court please, I am going to object. Only one has the plaintiff's signature. All these signatures—he is going to testify what he did with respect to twenty or twenty-five others.

The Witness: Will you repeat the question, please?

(The Reporter read the previous question.)

A. Yes.

Q. (By Mr. Kiernan.) What did you do?

A. I contacted our Chicago office, Mr. William R. Teece, our Division Manager, and told him that I—

Mr. Daniels: (Interposing.) If the Court please, I am going to object. That is the rankest kind of hearsay.

The Court: Objection sustained.

Q. (By Mr. Kiernan.) Did you see any instructions from Mr. Teece?

* Mr. Daniels: Same objection.

359 Q. (By Mr. Kiernan.) Did you receive any instructions from Mr. Teece?

A. Yes.

Q. What was the time that you received those instructions from Mr. Teece?

A. It was on the morning of November 1st or, no—the first time on November 1st, the second time about the 6th of November.

Q. As the result of the instructions you received on or about the 6th of November, did you go to the plaintiff's place of business?

A. I did.

Q. Who did you see there?

A. Mr. Walter Lutz.

Q. Did you have a conversation with Mr. Lutz?

A. I did.

Q. What did you tell him?

A. I told Mr. Lutz that we had understood and we had seen the filings at the Liquor Commission of all the distributors, of all the Seagram distributors, wherein they had filed for a 15% markup on the overall laid-in merchandise and that Mr. Teece had informed me to call on all the distributors to tell them that it was not the policy of our company to increase our merchandise at that particular time, that in accordance with the views expressed by our government, a hold-the-line policy was adopted in order to curb possible inflation and from a standpoint of patriotism we did not think it was fair to go beyond the wishes of the government in that respect. Therefore, I informed Mr. Lutz that I was advised that no more Seagram shipments would be made to any Indiana distributors until the price raises were clarified. And further, that from our viewpoint all of our Indiana distributors were no longer Seagram distributors.

Q. Was anything else said on that occasion?

A. Yes, Mr. Lutz told me that he did not know what position Kiefer-Stewart would take because Mr. Moxley had left for the day.

Q. Was anything said by Mr. Lutz as to any action by other distributors?

A. No, I don't recall.

Q. When next did you see anybody connected with 361 the plaintiff?

A. I believe, let's see, November 8. On November 8th, that was a couple of days later, I talked to Mr. Lutz and he still could give me no further information on what attitude Kiefer-Stewart were going to take with respect to filing a raise in prices which was contrary to the principles that we had.

The Court: What was the price before?

The Witness: Well, the increase in price amounted to—

The Court: (Interposing.) I say what was it before?

The Witness: Well, you mean on what particular item?

The Court: You know what item we are talking about, whiskey.

The Witness: 7 Crown, VO and Gin.

The Court: Go ahead with the next question. I don't know anything about your 7 Crown.

Mr. Paul Davis: If the Court please, the price 362 change, and also the price change was different on each item.

The Witness: I can give you the price increases if that is what you want.

The Court: Go ahead with the next question.

Q. (By Mr. Kiernan.) Did you say anything to Mr. Lutz about the fact that Seagram was not increasing its price to distributors?

A. That is right. I told him we were not increasing our price. I know other distilleries had gone on record as favoring price increases, but from our standpoint we did not think it advisable to not adhere to the wishes of the government as far as trying to curb inflation by keeping our prices at the same level that they were during the OPA regime.

Q. Did you mention anything to them about the fact that all of the distributors had filed their prices practically simultaneously?

A. Yes.

Mr. Daniels: I am going to object to leading the witness.

363 The Court: Objection sustained.

Q. (By Mr. Kiernan.) Tell us what was said about that.

A. Mr. Lutz told me that they had had a meeting at the

Warren Hotel on May 31st and the report of that meeting—

Q. (Interposing.) Excuse me, you said May 31st.

A. On October 31st.

Q. 1946?

A. 1946. And from the action taken at that meeting all the distributors had agreed to file a new and increased price schedule, now that the OPA controls were lifted and that increase amounted to \$1.44 to approximately \$1.80 a case on Seagram products.

Q. Now, did you report that conversation to your superior in the Seagram organization?

A. I did.

Q. Who was that?

A. Mr. Teece.

Q. Now, did you see anybody connected with the plaintiff or any of the other distributors about the 12th of November, 1946?

364 A. On November 12th I talked to Brown over the telephone, of Conard. I talked to Cotton Leaf; I talked to Bill Adams at Terre Haute; I talked to Manthe, the President of the Wholesale Liquor Dealers Association at Ft. Wayne; I talked to Bob Shambaugh, Kaplan of the Minardo; Charlie Murray of Standard. I did not talk to Beck or Fansler. I think they were in New York. They were in New York on the 8th of November and were on the way back. I think I did not see Bill Freaney of Mooney-Mueller-Ward either. I believe he was out of the city.

Q. You say you had a conversation with Mr. Adams?

A. Yes, sir.

Mr. Daniels: Your Honor, I am going to object to these conversations not in the presence of the plaintiff.

The Court: Go ahead.

Q. (By Mr. Kiernan.) Will you state, Mr. Bernbach, the conversation you had with Mr. Adams?

The Court: In the presence of the plaintiff?

365 The Witness: No.

Mr. Davis: If the Court please, I would like to be heard.

The Court: I don't care to have a hearing on that. That is apparent. Objection sustained.

Mr. Paul Davis: I wish to make an offer to prove on that.

The Court: Offer anything you want to but you are just taking time on that.

In the absence of the plaintiff, asking what he said about things in reference to prices, why, it is just unreasonable.

Mr. Davis: Your Honor, we have made a prima facie case of conspiracy among these wholesalers.

The Court: I don't think you have. I will tell the jury that when the time comes. I don't think you have made a case of conspiracy in respect to these plaintiffs. I will say that now and I will say it later. Of course, if it appears 366 that a conspiracy existed the conversation of one becomes the conversation of all, but until that conspiracy is proven, that isn't it as I see it.

Mr. Davis: If the Court please, I would like to cite some authorities at the noon hour on this.

The Court: We have been over this so often—

Mr. Davis: (Interposing.) I don't think the Court has apprehended all the evidence in this.

The Court: I may not know about this case.

Mr. Davis: The Defendants offer to prove and the witness will testify if permitted to do so in response to the question that Mr. Adams told him that the price arrangement had been made by a committee consisting of Mr. Moxley, Mr. Beck, Mr. Fansler, Mr. Bradford, and Mr. Adams and that they had put it through.

The Court: Any other questions?

367 Q. (By Mr. Kiernan.) After the 12th of November, Mr. Bernbach, did you have occasion to discuss anything with the plaintiff's representatives?

A. I think around the 12th, 18th—I think around—well, it was the latter part of November, I don't remember, probably the 19th or 20th of November, I talked with Mr. Lutz again and the question came up at that time when Seagram were going to start shipping. I said, "Mr. Lutz, that is all contingent on what you distributors in Indiana do in respect to this price situation. You all got together and decided to raise prices and Seagram will not go along with that program."

Q. What did Mr. Lutz say in reply to that?

A. He said, "That is entirely up to Mr. Moxley."

Q. When again did you have, if at all, occasion to discuss the situation with Mr. Lutz or anyone else connected with the plaintiff?

A. I don't believe from that day on until I met Mr. Lutz in Chicago on February 3rd that I had any occasion to discuss it with them—just marked time, I believe.

368 Mr. Kiernan: That is all.

Cross-Examination by Mr. Daniels.

Q. What you said to Mr. Lutz these three times, you say you have talked to him in substance, was that Seagram was not going to ship any liquor into Indiana until the plaintiff, Kiefer-Stewart, came to their price terms.

A. No, not only Kiefer-Stewart but all distributors including Kiefer-Stewart.

Q. Came to their terms?

A. Not came to their terms.

Q. Filed a schedule such as had under OPA?

A. No. I said went along with our program.

Q. Came to your terms, isn't that right, Mr. Bernbach?

A. No.

The Court: What you mean to say is you were not going to sell any of them any more whiskey, Seagram, unless they sold at the price you fixed?

369 The witness: We did not fix any price.

The Court: What was your terms?

The Witness: We told them we had not increased our prices, we did not see any particular reason why the Indiana distributors should increase their prices even though other distilleries had, we felt we should hold the line as far as prices were concerned.

The Court: And if they did increase prices you would not send them any more?

The Witness: No, we did not send them any more.

The Court: Let's adjourn until two o'clock.

During the time you are separated, you will be permitted to go about your own way, but don't talk with anyone or permit anyone to talk with you about the case, and keep in mind the instructions I have heretofore given you on that subject and be back promptly at two o'clock.

Whereupon the Court adjourned at 12:45 to reconvene at 2:00 o'clock p.m.

370.

Indianapolis, Indiana

Friday, May 20, 1949

2:00 o'clock p.m.

The Court met pursuant to adjournment and the trial was resumed as follows:

VICTOR A. FISCHEL, a witness called on behalf of the Defendants, being first duly sworn, testified as follows:

Direct Examination by Mr. Kiernan.

Q. Will you state your full name and address for the record, please, Mr. Fischel?

A. Victor A. Fischel, 34 Haden Road, Scarsdale, New York.

Q. What is your position?

A. President of Seagram Distillers Corporation.

Q. Are you also a director of that corporation?

A. Director of Seagram Distillers Corporation.

Q. Do you have any connection with Joseph E. Seagram & Sons, Incorporated?

A. No, sir.

Q. Are you a director of Joseph E. Seagram & Sons, Inc?

A. Yes, sir.

Q. So that you do have that connection with the corporation?

A. Yes, sir.

Q. What position did you occupy in the months of 371 October, November and December, 1946, and January and February, 1947?

A. Vice President.

Q. Of what?

A. Of Seagram Distillers Corporation.

Q. And as Vice President of Seagram Distillers Corporation during those months, what were your duties?

A. In complete charge of sales and advertising for the United States on all of Seagram Distillers Corporation products.

Q. Now, what products did Seagram Distillers Corporation sell in the years 1946 and '47?

A. Seagram's V.O., Seagram Seven Crown, and Seagram's Ancient Bottled Gin.

Q. As I understand it, Mr. Fischel, Seagram Distillers Corporation is not a manufacturing company but merely a sales company for Joseph E. Seagram & Sons, Inc.?

A. That is correct.

Q. Now to whom does Seagram Distillers Corporation sell its products or let's confine that to the period 372 of time from October, '46, until February, '47.

A. Seagram Distillers Corporation sells its products to distributors in the United States and to monopoly State stores.

Q. No other customers than those whom you have described?

A. Yes, sir, we sell to the steamship companies.

Q. But generally speaking, you don't sell to retail outlets?

A. No, sir.

Q. In the United States?

A. No, sir.

The Court: What are the monopoly States? What do you mean by that?

The Witness: There are seventeen States controlled by the individual States, sir. They run their own liquor commissions and retail stores.

The Court: Vermont is one of them?

The Witness: Vermont is one of them, sir.

Q. (By Mr. Kiernan.) Now, Mr. Fischel do you 373 know the Kiefer-Stewart Company?

A. Yes, sir.

Q. Had your firm had relations with the Kiefer-Stewart Company prior to 1947?

A. Yes, sir.

Q. How long back had that relationship gone, if you know?

A. I think the relationship was before the time that I took over the sales in the country, but I would say it was prior to 1938.

Q. Prior to 1938? How long prior? You are not in position to say?

A. No, sir.

Q. Did Seagram Distillers Corporation sell its products to other wholesalers in the State of Indiana also in 1946 and '47?

A. Yes, sir.

Q. Now, was there any allocation arrangements under which you applied merchandise to customers in Indiana in 1946 and '47?

A. There was an allocation in 1946 and part of 1947.

Q. When did the system of allocation to which you 374 refer cease?

A. It did not actually cease but it was increased about April of '47. It was graded up.

Q. Will you explain to the Court and jury just briefly what that allocation system was with regard to supplying distributors in Indiana with merchandise?

A. Well, during the war years we were turning out our complete supply to the Government and we were using our whiskies and we were dividing them up to the best of our ability on an allocation base system, equally, all over, month by month, to the various distributors that we were doing business with, and when April came when more relief came from the Government, by them allowing us to make some whiskey for our own use, we increased our allocations and so gave it to the distributors.

Q. Now, had you had, prior to 1946, any disagreement with Kiefer-Stewart Company over the allocation?

A. Yes, sir.

Q. Will you tell us a little about that?

A. Well, the exact dates I can't give you, but about 375 October, 1942 we went on an allocation basis and so notified our distributors. The next I knew about it, the Credit Department advised me that I could no longer ship Kiefer-Stewart because there was an outstanding bill. When I investigated it, there seemed to be some trouble because Kiefer-Stewart was asking for more merchandise than we had allocated them, and we finally had a meeting with Mr. Moxley and we came to an agreement on the allocation that he was to get, but we had that discussion somewhere in January or February of 1943.

Q. Now, were those disputes from time to time between you and Mr. Moxley subsequent to that over the allocations that were allowed them?

A. Before 1942?

Q. No, subsequent to 1943, subsequent to the first dispute.

A. On several occasions after that.

Q. Were there any other controversies between you or representatives of Seagram Distillers that you know about

and Kiefer-Stewart in regard to the handling of business generally?

A. From time to time, not directly with me, but from—

376 Q. (Interposing.) Well, if you don't know that yourself, let's not go into that. Did you ever have any discussion with Mr. Moxley or Mr. Lutz with regard to the way Kiefer-Stewart & Company were merchandising the Seagram line of products in the State of Indiana?

A. I did not have it directly with them.

Q. You know there were such discussions?

A. Yes, sir.

Q. And disagreement between the Seagram Distillers and Kiefer-Stewart about that?

A. Yes, sir.

Q. Do you know who it was who had those discussions with Kiefer-Stewart representatives?

A. Do you mean the man that represented us?

Q. Yes.

A. No, I don't because I get my reports from Mr. Teece, our Central Division manager.

Mr. Daniels: If the Court please, on the basis of that last answer, I move the foregoing questions and answers go out. He could not know anything, it could not be anything but the grossest hearsay.

377 The Court: Did you hear any of the discussions yourself?

The Witness: No, sir.

The Court: How did you find out?

The Witness: We get reports from our men in writing.

The Court: I would not think that would be competent.

Mr. Kiernan: I am merely asking if he knew about the disputes. I am not asking what was said.

The Court: It is getting pretty close to it.

Q. (By Mr. Kiernan.) Now, Mr. Fischel, under the war-time price control regulations which had been imposed by the Federal Government on the sale of whiskey, were you familiar with what the OPA had limited the markup of wholesalers to on whiskey?

A. Yes, sir.

Q. What was the amount of markup allowed by the OPA?

A. They allowed the wholesaler to mark up fifteen per cent on his actual cost less the last Federal tax.

378 That was a wartime tax.

Q. That was the last three dollars a gallon tax?

A. The last three dollars.

Q. Imposed in '44 and '45?

A. They were not allowed to mark up the fifteen per cent on that last three dollar tax, but everything up to that.

Q. Do you know whether the wholesalers were permitted to include as a part of the cost in determining their markup any State tax imposed, increases in the State tax imposed by States?

A. No, sir.

Q. Well, did you know that subsequent to the OPA regulations a dollar a gallon had been imposed by the State of Indiana on the sale of alcoholic beverages?

A. Yes, sir.

Q. Did you know that the fifteen per cent could not be applied to that?

A. Yes, sir.

Q. Now, I take it, then, that there was a total of four dollars of the wholesaler's cost upon which we could
379 not apply the fifteen per cent markup in Indiana?

A. Yes, sir.

Q. Now, do you recall the withdrawal of OPA controls in October, 1943?

A. Yes, sir.

Q. 1946, I beg pardon. Had you given any consideration at or about that time to the question of what you as the sales executive of Seagram Distillers Corporation would do with respect to the increasing of Seagram's merchandise or continuing to sell it at the same price after the withdrawal of OPA controls?

A. Yes, sir.

Q. Did you arrive at a conclusion?

A. Yes, we did.

Q. When you say "We", who do you mean?

A. Seagram Company.

Q. Specifically, who made the decision?

A. I made the decision.

Q. What was the decision?

A. The decision was, in view of the Government's asking the different merchants to hold the line, I elected
380 to advise all the division managers, the wholesalers, and the retailers that we would not raise our price

to the retailer and asked them also to hold the line, not to raise their price to the retailer, and that the retailer should not raise the price on Seagram products to the consumer.

Q. Now, Mr. Fischel, was your attention drawn to any situation in the State of Indiana in the early part of November, 1946, with respect to the price of Seagram's merchandise?

A. Yes, sir.

Q. Will you state what came to your attention?

A. There came to my attention through our division manager, Mr. Teece, that all of a sudden on November 6th he advised me that all the distributors in the State of Indiana had raised the price on Seagram's products. I asked for confirmation of it and saw that through the representative in the State, that all the distributors had filed this increased price and to me, I studied it and decided that it certainly looked like a conspiracy and as far as I was concerned—

Mr. Daniels: Your Honor, I move to strike out the 381 answer. It is a conclusion of the witness, and has no place in the answer to the question.

Mr. Paul Y. Davis: He has a right to tell what he thought about it as the basis of the action he took. He might have been mistaken.

The Court: What was the question?

Mr. Daniels: In answer to that he is expressing an opinion, that isn't responsive to the question at all.

The Court: Wouldn't it be more that he is telling hearsay?

Mr. Daniels: Purely hearsay. I move to strike the whole answer.

The Court: Objection sustained.

Mr. Paul Y. Davis: There was a motion to strike the answer.

The Court: I objected to the question and moved to strike out that part of the answer as he has given.

Mr. Paul Y. Davis: May we have an exception?

The Court: What he knows personally, of course, is competent.

382 Mr. Kiernan: I suppose if he comes to any decision he is entitled to act or arrive at the decision upon the basis of facts which he knew to exist at the time.

The Court: I am not so certain that he can tell what those facts are. He can tell what the decision was.

Mr. Kiernan: He has to be informed of some facts in order to arrive at a decision.

(Defendants' Exhibits 23 and 24 were marked for identification.)

Q. (By Mr. Kiernan.) I show you this document, Mr. Fischel, and ask you if you are able to identify it and tell us what it is. Will you state what the paper is that you hold in your hand?

A. This is United States of America *versus* the Colorado Wholesale Wine & Liquor Dealers Association, Inc.—Indictment.

Q. Were you named as a party to that indictment?

A. I was, sir.

Q. What was the charge contained in the indictment?

383 A. The charge as far as I was concerned was conspiracy to act with the wholesalers of the State of Colorado.

Mr. Kiernan: I offer the indictment in evidence.

The Court: Did you act with them, you mean, in fixing prices?

The Witness: Correct, sir.

Q. (By Mr. Kiernan.) I show you this paper, Mr. Fischel, and I will ask you if you can identify that. You had better examine it carefully. Perhaps if I draw your attention to the specific portion of it—

Mr. Daniels: (Interposing.) I don't understand whether you have actually offered these documents. I want to say we are going to object to them as immaterial. I don't think he has offered them yet. I will object to any examination of them.

Mr. Kiernan: I merely want to identify the document for the purpose of the record.

Q. (By Mr. Kiernan.) Will you state, Mr. Fischel,
384 whether you are able to identify the document?

A. Yes, I do.

Q. What is it?

A. It is a record of an indictment against me in which I paid fifteen hundred dollars fine to the United States.

Q. Was that pursuant to this indictment?

A. Yes, sir.

Q. Do you recall the approximate time of this, and I will show you the paper.

A. 1941 to 1942.

Q. No, that is the date of the judgment.

A. May 14, 1945.

Q. Now, Mr. Fischel, when it came to your attention that the wholesalers in Indiana, in November, 1946, had filed identical price postings, did you come to any conclusion as to what you on behalf of Seagram Distillers Corporation would do about that?

A. Yes, sir.

Q. What was the conclusion that you arrived at?

A. That I would not play any part in any price fixing or any conspiracy with the wholesalers to raise the 385 price of our products.

Mr. Daniels: I move, your Honor, to strike the answer out.

The Court: You did attempt to fix the price yourself, didn't you?

The Witness: No, the OPA did, sir.

The Court: After that?

The Witness: Only to the point they were not to touch the OPA price that—

The Court: (Interposing) The price you fixed after OPA went out of existence, you insisted they go ahead and use the same price?

The Witness: We did not insist, we asked them to hold the line.

The Court: What did you mean?

The Witness: Not to raise them, that is right.

The Court: In other words, to use the same price that OPA had fixed. Was this indictment against you individually or against the Seagram of Colorado?

Mr. Kiernan: Against the witness individually and 386 a number of others, if your Honor please.

I can point out to your Honor just where he is named, if you desire.

The Court: Your name is Fischer, is it?

The Witness: Fischel.

Q. (By Mr. Kiernan.) Now, did you issue any instructions, Mr. Fischel, as to what should occur?

A. Yes, I did.

Q. What instructions did you issue?

A. I issued instructions that anybody that raised the price of Seagram would not get any further shipments of Seagram's and if they did that, they would be no longer a Seagram distributor.

Q. Well, now, did that relate to the wholesalers in the State of Indiana?

A. Yes, sir.

Q. Now, did you consult with anyone either connected with Calvert Distillers Corporation or anyone else before arriving at that decision other than people connected with Seagram Distillers Corporation?

A. No, sir.

387 Q. Do you know Walter Lutz?

A. Yes, sir.

Q. Did you have a conversation with him in Chicago on or about the 3rd of February, 1947?

A. What date?

Q. On or about the 3rd of February, 1947.

A. Yes, sir.

Q. Will you tell us what that conversation was?

A. Mr. Lutz came to my room and asked me what the situation was going to be as far as Kiefer-Stewart was concerned. I advised Mr. Lutz at that time that we were not going to do business with him any longer. We were through with them and were not putting them back on our list when we were appointing our new distributors. Discussion came up as to the last order of merchandise and I said he was entitled to that last order of merchandise, but that is all I would give him. I agreed to give him that last order which is on file. I can't give you the exact amount of it, but it was the order for November, 1946.

We had further discussions and I don't remember the full details of them, but words to the effect that I
388 hoped to see Mr. Moxley some day, but that was final, and that I had the right to make any say the last word representing Seagram, and I wanted Walter to know it. Those were the highlights.

Q. Well, now, was anything said in that conversation that you did not see eye to eye with Kiefer-Stewart on policy?

A. We had a lengthy talk, went back into a bit of history on cooperation, but to cite exactly what the conversation was, I cannot.

Q. Was anything said with respect to the dispute which had previously occurred about allocation?

A. Oh, yes, I mentioned that.

Q. Tell us about that.

A. We discussed the allocation part of it, that Mr. Moxley and I had the disputes on the allocation and that I

thought that we had been very fair with them and that I did not like the situation that had existed in the last years prior to 1946 and since 1942, and the lack of cooperation they were giving me.

Q. Did you say anything about the fact that you did not like the idea of their talking to your cousins?

389 A. I did not.

Q. Was anything said, Mr. Fischel, in the course of that conversation about an expected lawsuit against you by Kiefer-Stewart & Company?

A. No, sir.

Mr. Daniels: What was the answer?

The Witness: No, sir.

Q. (By Mr. Kiernan.) Mr. Lutz has given this testimony in connection with the conference between you and him on February 3rd, 1947 in Chicago:

"Question: Did he say anything to you concerning any anticipated litigation with Kiefer-Stewart?"

"Answer: He said to me he thought that Mr. Moxley might sue the Seagram Company over this transaction, he expected it, and he thought that maybe Mr. Moxley might win it. He thought that it might cost Seagram some money."

"He also said"—Mr. Fischel—"I am the last word as far as Seagram is concerned. There will be nothing done in this matter until I give the word."

Did you make any such statement as that to Mr. 390 Lutz?

A. The part of it where I told him I was the last word on the decision, I never brought up the discussion that Mr. Moxley was going to sue Seagram.

The Court: What is Mr. Lutz's first name?

The Witness: Walter Lutz.

The Court: Was there a John Lutz that was a defendant in that Colorado case, L-u-t-z?

Mr. Kiernan: You may cross-examine.

Cross-Examination by Mr. Daniels.

Q. You did say, Mr. Fischel, and you recall that, I gather, "I am the last word in this matter"?

A. Yes.

Q. What did you mean by that?

A. Well, when a distributor wants to get the Seagram line, the natural course of events is that he applies to a state manager and then it goes to a division manager and

it eventually comes up to somebody that is the immediate head of the company, and when they are to be put on the line in Seagram Distillers Corporation, no distributor can be given the Seagram line without an okay from me and nobody can lose the Seagram line without an okay from me.

Q. What was your position then?

A. Vice President in charge of sales and advertising.

Q. Who was President?

A. There was no president.

Q. Wasn't Mr. Schwengel president?

A. I think Mr. Tom can answer. General Schwengel was President of Joseph E. Seagram. I don't know the legal part of it. There was no president of Seagram Distillers Corporation.

Q. You had the final authority in Seagram Distillers Corporation?

A. That is right, sir.

Q. What about the gentlemen in Canada? Did you have authority to act regardless of what they might say?

A. Yes, sir.

Q. When did you come with Seagram's?

A. I came with Seagram Distillers Corporation in the United States January 4, 1934. Prior to that I was working for Distillers Corporation, Limited, from July, 1928, in Montreal, Canada.

Q. You went with Distillers Corporation, Limited, the Canadian corporation, in July, 1928?

A. Yes, sir.

Q. Had you had any business connections before that?

A. Prior to that?

Q. Yes, sir.

A. With Seagram's?

Q. With anybody.

A. I was in advertising, Outdoor Advertising, prior to 1928.

Q. In Canada?

A. In Canada.

Q. You were with the Canadian corporation from 1928 to 1934?

A. Yes, sir.

Q. Confined your activities to the corporation in Canada?

A. Yes, sir.

Q. Did you get into the United States at all in connection with the business activity?

A. None whatsoever. I was in charge of the sales in the Province of Quebec only.

393 Q. What company's whiskey were you selling there?

A. Distillers Corporation, Limited, had numerous brands and they were selling to the Province of Quebec, which is what we call a monopoly state, sir.

Q. When did these allocations of whiskey cease entirely, after the end of OPA, for Seagram?

A. Well, just let me get—on April of 1947 we increased them and about July or August of '47 we took off the allocations.

Q. When did you meet with the Calvert officials, officials of either Calvert Distilling Company or Calvert Distillers Company to discuss deliveries of whiskey to wholesalers in Indiana?

A. I did not discuss it with them at all.

Q. With either Calvert Distillers or Calvert Distilling?

A. I did not discuss it with Calvert at all.

Q. Do you know Mr. James E. Friel?

A. Yes, sir.

Q. Who is he?

A. He is Vice President and Treasurer of Distillers Corporation, Seagram, Limited.

Q. Do you regard his statements under oath as reliable?

394 A. Yes, sir.

Q. I am going to call your attention, Mr. Fischel, to the fact that Mr. James E. Friel, in a statement under oath, made the following answer to the following interrogatory:

"State whether between November 6, 1946 and February 3, 1947 any officer or employee of Seagram, Indiana," that is, Joseph E. Seagram & Sons, "Seagram Sales," that is, your company, "or Distillers Corporation, Seagram, Limited, communicated to or conferred with any officer or employee of Calvert Sales," that is, Calvert Distillers Company, "with reference to the delivery or non-delivery of Calvert products to Indiana wholesalers," to which Mr. Friel, under oath, answered "Yes."

Mr. Friel next answered this interrogatory:

"State whether between November 6, 1946 and February 3rd, 1947 any officer or employee of Seagram, Indiana, Seagram Sales, or Distillers Corporation, Seagram Lim-

ited, communicated to or conferred with any officer or employee or Calvert Sales with reference to the delivery 395 or non-delivery of Calvert products to Kiefer-Stewart Company."

Mr. Friel answered, under oath, "Yes."

The next interrogatory: "If the answer to Interrogatories No. 14 or 15 is in the affirmative, state the names of persons so conferring or sending or receiving such communications and the date or dates of such conferences or communications."

To which Mr. Friel answered, under oath: "The names of the persons so conferring were: Samuel Bromphman, Victor Fischel, W. W. Wachtel, Frank Schwengel, Tubie Resnik, and possibly others whose names are unknown to the defendant."

Having heard those answers under oath by Mr. Friel, do you care to revise your statement to me that you never talked to anybody in the Calvert organization concerning deliveries of whiskey to Indiana or Kiefer-Stewart in Indiana?

A. I did not.

Q. Then you say Mr. Friel has made a false oath?

A. I am not making a statement—you are asking me.

Q. I am asking you if that statement is true.

A. I said I did not confer with them.

396 Q. That is all I want to know. You deny that is a correct statement?

A. That is right.

Q. If he made the same response in respect to the Calvert Distillers Company and the Calvert Sales, you still say that it is absolutely an untrue statement?

A. That is correct.

Q. Now, when you told Mr. Lutz you were the last word, you told him Kiefer-Stewart would not get any more whiskey, Seagram whiskey?

A. That is right.

Q. Or Calvert?

A. I had nothing to do with Calvert.

The Court: When was it you bought Calvert?

The Witness: I can't tell you that.

Q. (By Mr. Daniels.) To refresh your recollection, you bought it in April, 1945?

A. We bought Calvert?

Mr. Kiernan: He is talking about the stock of Calvert, not the Calvert line, I take it.

397 The Court: Well, when you own all of the stock, you own the company?

The Witness: Well, I have nothing to do with that.

The Court: All right.

Q. (By Mr. Daniels.) Now, it is a fact that Calvert has not shipped any whiskey to Kiefer-Stewart at all beginning in October and coming to the present time?

A. I don't know anything about Calvert's operations.

Q. Never inquired into that?

A. No, sir. I don't know what they do. I have nothing to do with the Calvert Sales' operations.

Q. Are you familiar with the complaint in this case, Mr. Fischel?

A. Yes, sir.

Q. Even after you read it you did not take the trouble to inquire whether Calvert Sales had ever delivered any Whiskey to Kiefer-Stewart?

A. It did not bother me.

Q. You did not pay enough attention to see whether that was a true allegation?

A. When I came to the court I knew we didn't make 398 any shipment.

Q. I didn't ask you that. I said you did not know until this suit was filed, you did not know. You want the jury to believe that?

A. That is right.

Q. That Calvert never made any shipments?

A. I know now they did not. I did not know then.

The Court: What is your position with Schenley?

The Witness: Schenley?

Mr. Daniels: Seagram, your Honor.

The Witness: I am President today of Seagram Distillers Corporation, which is the sales company handling the sales for Seagram products.

The Court: It is not the company that owns the stock?

The Witness: No, sir, just the sales company.

The Court: What company owns the stock?

The Witness: I think Joseph E. Seagram & Sons.
399 The Court: Are you connected with that in any way?

The Witness: I am a director of that. Why I couldn't answer you about the Calvert, I don't know about the stock transaction about Calvert.

The Court: All I know is what I have heard here.

Q. (By Mr. Daniels.) You are the director of Joseph E. Seagram's and have been since 1943?

A. Yes, sir.

Q. Which we call Seagram here. If, as the evidence shows here, Seagram acquired all of the stock of Calvert in 1945, you were a director at the time of that transaction, weren't you?

A. Yes, sir.

The Court: You were doing business with the plaintiff when this indictment was returned in Colorado?

The Witness: Yes, sir.

400 Q. (By Mr. Daniels.) Are you familiar—of course, you are familiar with the product known as Seagram Seven Crown, aren't you?

A. Yes, sir.

Q. Has there been any change in the ingredients that enter into the Seven Crown product in the last year, the types of whiskey that would enter into that blend?

A. The types of whiskey?

Q. As to, in respect to their age.

A. Oh, yes, sir.

Q. What has that change been?

A. We keep changing periodically. There have been changes in the blends on Seagram Seven Crown.

Q. I will ask you if within the last year you haven't put in a larger proportion of the younger whiskey as against what used to be a larger proportion of the older whiskeys.

A. I don't get your question.

Q. Haven't you put more in Seagram blends the last year of younger whiskeys than you put in in, say, February, 1947?

A. Yes, sir.

401 Q. Those younger whiskeys are less costly whiskey, aren't they?

A. I can't tell you that, I don't know.

Q. You don't know whether a three or four year old whiskey is less valuable than a five or six year old whiskey?

A. You are getting into a technical point. The price of whiskey has been fluctuating many years during the war.

Q. Very true, but isn't it true, Mr. Fischel, in the whiskey business, you have been in the whiskey business a long time, isn't it true the older the whiskey, the more valuable, regardless of the fluctuating in prices that there may be?

A. Not necessarily.

Q. Isn't that true?

A. No, sir.

Q. You mean you think a two year old whiskey is as valuable as one that has been aged five years?

A. No, I can show you whiskey which is four years old that you can buy cheaper—and a seven year old that you can buy at a cheaper price than a four year old.

Q. Maybe you can show me. I am asking you if the 402 younger whiskey is not the less valuable.

A. Up to a certain point, up to four years you might be right, but from four years on, the price of whiskey—

The Court: (Interposing.) It doesn't make much difference after it's four years old?

The Witness: You are asking a question that is hard to answer technically.

Q. (By Mr. Daniels.) The fact is, your present ingredients in Seven Crown contain fewer of the old whiskey yet, isn't that right?

A. Well, it contains a bigger percentage—

Q. (Interposing.) Of younger whiskey?

A. Of younger whiskey.

The Court: I don't know just what that has to do with it.

Mr. Daniels: Only this, your Honor: We are charging here, and I think we have proved, that after this conspiracy to cut off the trade of Kiefer-Stewart and to dominate this market, when the wholesalers fixed the price at 403 what was demanded by the defendants, they then very shortly filed these fair trade contracts, making that the maximum price as well as the minimum, and thereafter they have cheapened the quality of their product but have not reduced the price of it, showing they are maintaining and getting a higher price for what was a less valuable liquor, whereas they do so without decreasing their own price.

The Court: That is pretty technical.

Mr. Daniels: It is, but I wanted to show that, your Honor.

Q. (By Mr. Daniels.) Now it is a fact, isn't it, Mr. Fischel, that the price of the wholesalers in every state varies due to state liquor taxes?

A. You are approximately right. Some states have the same tax.

Q. But if they don't have the same tax, there is a different price in every state?

A. Right.

404 The Court: Seagram is a blend of whiskey?

The Witness: That is right, sir.

Mr. Kiernan: And neutral grain spirits.

The Court: Well, I say it is what is called a blend?

The Witness: That is right.

Q. (By Mr. Daniels.) I am going to ask you this once more: This statement that Mr. Friel made under oath is absolutely wrong as far as you are concerned?

A. I won't say it is wrong. I was not in any meetings.

Q. It is bound to be wrong if you weren't there?

A. That is correct.

Witness excused.

405 Mr. Paul Davis: If the Court please, we offer Defendants' Exhibits 23 and 24 as part of the examination of this witness.

The Court: Any objections?

Mr. Daniels: Yes, your Honor. It has no bearing whatever—utterly immaterial to the issues in this case whether this man was indicted or not.

The Court: Well, I think it is competent evidence.

Mr. Daniels: I certainly can't see any materiality to the issues that are here.

The Court: Well, the indictment—is that the indictment you are offering?

Mr. Davis: Both the indictment and the judgment. The indictment is Exhibit 23 and the judgment Exhibit 24.

Mr. Daniels: The case went to the Supreme Court; I assume he is entitled to argue it. I don't think it is material.

The Court: It was affirmed.

406 Mr. Daniels: Against the defendants, yes, your Honor. (DEFENDANTS' EXHIBITS 23 AND 24 were admitted in evidence.)

407 WILLIAM W. BEHRMAN, a witness called on behalf of the Defendants, being first duly sworn, testified as follows:

Direct Examination by Mr. Kiernan.

Q. Will you state your full name and address for the record, sir?

A. William Behrman, Indianapolis.

Q. What is your residence address?

A. 5882 Haverford.

Q. What is your position?

A. State Manager for the Seagram Distillers Corporation.

Q. How long have you occupied that position?

A. Since March, 1947.

Q. Now, Mr. Behrman, I show you Plaintiff's Exhibits 3 and 4 and ask you if you recognize what those papers are.

A. Exhibit 3 is the Wholesalers Fair Trade Agreement entered into between ourselves and Fred A. Beck Company. The second is a Calvert Fair Trade Agreement which I am not personally acquainted with, but recognize the contents.

Q. Well, now, does the Seagram contract which is Plaintiff's Exhibit 3 bear your signature?

A. It does, sir.

Q. Will you tell us the circumstances under which those contracts were promulgated?

A. The Indiana Alcoholic Beverage Commission notified me on July 1st of 1947 that fair trade regulation No. 11 becomes law, copies of same and all necessary forms for filing can be obtained at this office. Deadline on producer filing July 15th. Effective date fair trade prices August 1st. All filings after July 15th and before August 15th will appear and become effective on September 1st, supplementary price listings. As a result of that we secured from the—they were mailed to us from the Indiana Alcoholic Beverage Commission, the necessary forms for filing the fair trade contracts between our office and our Indiana distributors.

Q. So that if I understand you correctly, this fair trade contract which was signed by you on behalf of Seagram and the Fred A. Beck Company, a distributor here, was a form of contract which is supplied to you by the State Liquor Authority.

A. That is right, sir.

Q. Seagrams had nothing to do with preparing this contract?

A. That is right, sir.

Q. You had it executed and filed at the request of the State Liquor Authority?

A. In cooperation with the State Liquor Authority.

Mr. Kiernan: That is all.

Cross-Examination by Mr. William Davis.

Q. Mr. Behrman, are you required to file a fair trade contract in Indiana?

A. No, sir, we are not.

Q. Isn't it true that when you file a fair trade contract, there is an obligation upon a person who is a party to that contract with you, not to sell your products at any price less than that which may be fixed in any price postings that are made under that contract?

410 A. That is right.

Q. You are not saying, are you, Mr. Behrman, that you are required to sign any contracts such as that with Mr. Beck, are you?

A. We were not forced to do so.

Mr. Daniels: You were not forced? I didn't hear your answer.

The Witness: We were not forced to do so, but no product under this regulation can be advertised unless it is a fair trade product.

Q. (By Mr. William Davis.) You were not required to sign this contract?

A. Beg pardon?

Q. You were not required to sign this contract, were you?

A. That is right.

Mr. Davis: " it is all.

Redirect Examination by Mr. Kiernan.

Q. But in order to advertise Seagram products
411 in this State, it is necessary to enter into these contracts?

A. A product to be advertised in regularly published newspapers, shall be fair trade items if they are to be advertised by brands and price.

Q. Mr. Behrman, prior—I guess you would not know that. You have been in this State how long?

A. I came with the company September 1, 1947.

Q. So you would not know whether or not—you mean May 1st?

A. May 1st. I beg pardon.

Q. So you would not know whether prior to the date of your connection with the company it had any fair trade contracts in this State between itself and wholesalers?

A. Only from my perusal of our records in the office.

Q. Let me ask you this question: Between the time you became connected with the company on May 1, 1947 and the date of this contract which is July 14, 1947, was there in existence between Seagram Distillers Corporation or Joseph E. Seagram & Sons, Inc. and the wholesalers 412 in this State any fair trade contract?

A. There were none.

Mr. Kiernan: That is all.

Witness excused.

413 WILLIAM SCHWALB, a witness called on behalf of the Defendants, being first duly sworn, testified as follows:

Direct Examination by Mr. Kiernan.

Q. Mr. Schwalb, will you state your full name and address for the record, please?

A. William Schwalb, 235 Church Road, Winnetka, Illinois.

Q. What is your position, Mr. Schwalb?

A. Division Manager for the Calvert Distillers Corporation, Centralia Division.

Q. Where is your office located?

A. Chicago.

Q. How long have you occupied that position?

A. Since 1945, January.

Q. Were you at French Lick in October of 1946 at the time the Wholesale Liquor Dealers of Indiana were having their convention?

A. Yes, sir.

Q. Was anyone else with you from the Calvert Company?

A. Mr. Gollin.

414 Q. Who is he?

A. Mr. Gollin was Assistant Vice President of Calvert Distillers Corporation.

Q. What were his functions?

A. Well, he was in charge of sales nationally.

Q. Who else?

A. Mr. Olsen, State Manager for Calvert Distillers Corporation, Indiana.

Q. While you were there did you meet anybody connected with the Kiefer-Stewart Company?

A. Yes, sir.

Q. Whom did you meet?

A. Mr. Moxley, Walter Lutz and Walter Baker.

Q. What were the circumstances under which you met those gentlemen?

A. Met them in our suite at the French Lick Hotel and we were discussing them getting the Calvert line—that is the Kiefer-Stewart house.

Q. Were any arrangements concluded between you and the other Calvert representatives and the representatives of Kiefer-Stewart Company in that time in regard to their handling the Calvert line?

415 A. Well, it could be construed as arrangements from the standpoint that they understood that they were to get the Calvert line.

Q. Was there any order placed at that time or shortly thereafter by Kiefer-Stewart & Company with the Calvert Corporation for merchandise?

A. There was an order placed shortly after.

Q. I believe that it has been testified to here by Mr. Moxley and Mr. Lutz that no arrangement was concluded between Calvert and Kiefer-Stewart until November 5, 1946. Is that in accordance with your recollection?

A. I believe the order was placed before that.

Q. Well now, did you have a telephone conversation with Mr. Barrett Moxley on or about the 19th day of November, 1946 concerning the non-shipment of Calvert merchandise to Kiefer-Stewart Company?

A. Yes, sir. I don't remember the exact date.

Q. Was it sometime before the 19th?

A. About that time.

Q. Will you tell us what you said to Mr. Moxley and what Mr. Moxley said to you in the course of that
416 telephone conversation?

A. I called Mr. Moxley and told him—

Q. (Interposing.) Where were you at the time you made the call?

A. I was in my office in Chicago.

I called him and told him that we had decided not to make shipment of the order we had on hand, that we were cancelling that order. And Mr. Moxley immediately went into quite a lengthy talk on the short markup that distillers were getting and liquor stores were getting and attempted

to convince me that we were making a mistake, etc., that the liquor store markup was not large enough. I listened. All I told him was that we were not making shipment.

Q. Did you state to him at that time, any reason why you were not making the shipment?

A. No, sir, nor did he ask me.

Q. Did you tell him that the reason you were not making the shipment was because you had to go along with the Seagram policy?

A. No, sir.

Q. Did you ever make that statement?

417 A. No, sir.

Q. At any time?

A. Not to the best of my knowledge, at no time.

Q. Now, do you know Mr. Reznik?

A. Yes, sir.

Q. Was he present with you at the time you had that telephone conversation?

A. Yes, sir.

Q. In your office?

A. Yes, sir.

Q. Did you have any subsequent conversations with Mr. Moxley?

A. The only time that I remember having a previous conversation was at French Lick.

Q. Subsequent?

A. No, not since then.

(Defendants' Exhibit No. 25 was marked for identification.)

Mr. Kiernan: Your Honor, we are looking for another letter here. I will reserve the right to recall Mr. 418 Schwalb for the purpose of offering these Exhibits when we locate the papers. Otherwise I have no further questions at this time.

419 *Cross-Examination by Mr. Daniels.*

Q. Now, Mr. Schwalb, you, under the direct examination of your counsel, testified to the meeting of Mr. Moxley, Mr. Lutz and Mr. Baker at French Lick, on October 23, 1946, and then the next thing he asked you about was this telephone call on November 19th. I will ask if you did not come to Indianapolis and have a meeting with Mr. Lutz and Mr. Baker on November 5th and November 6th con-

cerning the Kiefer-Stewart Company taking on the Calvert line.

A. I think it was after that.

Q. Didn't you come down here on two occasions?

A. I was down here on two occasions.

Q. Both between October 23 and November 19, 1946?

A. I believe so.

Q. You think it was after November 6th that you had your first conference of that character?

A. No, probably around that time.

Q. At that meeting you were for Calvert and was anybody with you at that time representing Calvert? Was 420 your local man there?

A. I believe at that time I did not come down here directly to see Walter Lutz.

Q. I am not asking you that. I am asking you was anybody with you for Calvert?

A. Yes, Mr. Tarpey.

Q. Is he the Indiana representative?

A. Yes, sir.

Q. You and Mr. Tarpey representing Calvert, and Mr. Lutz and Mr. Baker representing Kiefer-Stewart, did come to a definite understanding, did you, about the Kiefer-Stewart Company becoming a Calvert distributor?

A. Yes, it was understood that way.

Q. That was confirmed again at a meeting a few days later, was it not, between you and Tarpey, for Calvert, and Lutz and Baker for Kiefer-Stewart?

A. Sir, at the first meeting I did not have a meeting with Walter Lutz and Walter Baker. I met Walter Baker in the lobby—

Q. (Interposing.) At French Lick?

A. No, in the lobby, around the 5th or 6th I met Mr. Baker in the lobby of the Severin Hotel. It was 421 practically an accidental meeting, just a visit.

Q. You discussed this matter of Kiefer-Stewart becoming a distributor for Calvert?

A. No, not definitely, just generally.

Q. Then you met them late?

A. Yes, sir.

Q. At the Harrison?

A. Yes, sir.

Q. You and Tarpey for Calvert?

A. Yes, sir.

Q. And Lutz and Baker for Kiefer-Stewart?

A. Yes, sir.

Q. You made a definite arrangement for Kiefer-Stewart to become a distributor of the Calvert line, didn't you?

A. Yes, sir.

Q. You fixed November 23rd as the day for a big sales meeting to launch the Calvert Stewart line with Kiefer-Stewart?

A. About that time, yes, sir.

Q. You telephoned Mr. Gollin in New York and arranged for him to come to that sales meeting?

422 A. I believe so.

Q. You instructed Mr. Lutz to get a room big enough for sixty people to hold the entire Kiefer-Stewart sales force and some of your executives and you and Mr. Tarpey, when you were going to start the Calvert line off at Kiefer-Stewart?

A. We discussed that generally, yes, sir.

Q. And arranged for that meeting?

A. I don't believe the final arrangements were made, but it was assumed.

Q. Set for November 23rd?

A. Yes, sir.

Q. Do you remember how many cases a month it was agreed that Kiefer-Stewart was to have of Calvert products?

A. I don't think that was definitely established.

Q. Two or three thousand to be increased later?

A. I know the order was two thousand cases, but I don't think the figure was definitely established.

Q. You say you telephoned Mr. Moxley on November 19, 1946. Who told you to telephone him?

A. Mr. Reznik.

Q. Mr. Reznik is the general sales manager?

423 A. General sales manager.

Q. Of the Calvert Company in New York?

A. Yes, sir.

Q. He was in your office?

A. Yes, sir.

Q. He had come in that morning, had he?

A. I don't know whether he was in the night before or not. He was there that morning with me.

Q. Came and told you to telephone Mr. Moxley and tell him you would not deliver him any Calvert products, is that right?

A. Yes, sir.

Q. Did you tell Mr. Moxley why you would not deliver him any Calvert products?

A. No, nor did Mr. Moxley ask me.

Q. What did Reznik tell you were the reasons?

A. We did not discuss any at that time.

The Court: Did you deliver any at all?

The Witness: No, sir.

Q. (By Mr. Daniels.) Do you mean to say when 424 Reznik came to you at that time, November 19th, and told you to call Mr. Moxley of Kiefer-Stewart, with whom you had these three meetings arranging for them to be a distributor of your products, Calvert products, in Indiana, and said to call the whole thing off, you did not ask Mr. Reznik why?

A. That was not discussed at that time. That was discussed earlier. That is generally speaking in the State of Indiana.

Q. Who discussed it earlier?

A. My manager in Indiana called me sometime around the first, the end of the first week or the beginning of the second week and told me.

Q. In November?

A. Yes, sir, told me he had heard that there was a meeting of the wholesalers in the State of Indiana, and they had decided to increase the price of our product. I asked him if he was quite sure of his information. He said he was. I in turn called Mr. Reznik and communicated the information that I had, as Mr. Tarpey gave it to me. Mr.

Reznik told me then to stop all shipments into the 425 State of Indiana.

Q. That was in the first week?

A. Well, it could have been at the beginning of the second week or the end of the first.

Q. Beginning of the first week of November?

A. Yes, sir.

Q. Then, I wish you would tell me why it was, after that time, you came down here, and as you testified, and made this complete detailed arrangement for Kiefer-Stewart to become a distributor of the Calvert line.

A. Sir, I did not know when we would start shipments, a week, two weeks, three weeks, three months.

Q. Why did you fix the sales meeting?

A. Because I anticipated earlier shipment, sir.

The Court: Your objection to increasing the price was

because you thought it might affect the amount of sales, is that right?

The Witness: Yes, sir, because it would affect the consumer price.

426 The Court: That is what I say, and would affect naturally the amount of sales that you would have in the State?

The Witness: Yes, sir.

Q. Were you sure it would affect sales?

A. I was not sure of it. It was expected that the higher the price the slower moving products, the smaller the field.

Q. The difference in price was very slight?

A. I could not tell you what it was. I did not figure it out.

Q. You did not bother to figure it out?

A. It was not a question of bothering. It had been discussed at length. I did not figure it out.

The Court: Was that before or after this understanding, we might call it, with Seagram?

The Witness: Sir, I don't understand the question.

The Court: With Kiefer-Stewart and Seagram, was that before or after?

427 The Witness: I don't know when they had their misunderstanding.

Q. You knew Seagram was not shipping any whiskey into Indiana?

A. I heard it.

Q. Where had you heard it?

A. Oh, you hear it, discussing with salesmen, etc.—rumors.

Q. You had heard it from nobody else but rumors?

A. As rumors, yes, sir.

Q. Had Reznik told you that?

A. No, sir.

Q. Did Wachtel tell you?

A. No, sir, I don't see him very often.

Q. Talk to him on the telephone?

A. No, I don't talk to him on the telephone.

Q. Mr. Reznik you do?

A. Quite often.

Q. He did not tell you until November 19th that you were not going to go through with this Calvert distributorship to Kiefer-Stewart, is that correct?

428 A. Well, that was final, the State was closed up

earlier than that. We had stopped all shipments, but the order for Kiefer-Stewart was not up for shipment.

Q. You did not tell Kiefer-Stewart a thing about it until November 19th?

A. Kiefer-Stewart wrote us a letter instructing us to hold the order.

Q. Answer my question. You did not tell Kiefer-Stewart a thing about cancelling and cutting off distribution you had agreed on November 12th, until November 19th?

A. I think it had been discussed before that, but I am not sure. You could be correct on that.

Q. As a matter of fact, I am correct, am I not?

A. You could be.

Q. You never did ship any Calvert Whiskey to Kiefer-Stewart?

A. No, sir.

Q. Did you call off the sales meeting on the 23rd of November?

A. Yes, sir.

Q. You know that Seagram never shipped any either, don't you?

429 A. So I heard. I don't know.

Q. Did Mr. Reznik tell you he had been in a conference in New York with the Seagram people?

A. No, sir.

Q. To discuss the question of shipment to Kiefer-Stewart?

A. No, sir.

Q. But if Mr. James E. Friel stated under oath that Mr. Reznik had been in conference with the Seagram people to discuss the question of shipments to Kiefer-Stewart, you would believe it, wouldn't you?

Mr. Paul Y. Davis: Your Honor, I object. That is not cross examination—merely argumentative.

The Court: Go ahead.

The Witness: Will you read the question?

(The Reporter read the previous question.)

A. Yes, sir.

The Court: I am not certain that I understand just
430 why you did not make the shipment into Indiana. As I understand you, you did have an arrangement made with Kiefer-Stewart to send them some whiskey, didn't you?

The Witness: Yes, sir.

The Court: Why wasn't it sent?

The Witness: Well, in the first place, sir, they requested that we hold their order until around the early part of November. After I sent an acknowledgment of their order to them, they wrote back a letter to me and instructed me to hold the order.

The Court: How long?

The Witness: They did not say.

The Court: You already had the stamps, didn't you?

The Witness: That I could not tell you, sir. That is a production matter.

The Court: Was there any other reason for not sending the shipment?

431 The Witness: Well, of course, the other reason would coincide with our decision not to ship into the State of Indiana.

The Court: Why?

The Witness: Because I had had a report from my manager that the wholesalers in the State of Indiana had had a meeting and decided to change our prices.

The Court: Do you usually attempt to fix price at which a wholesaler can sell the products you sell them?

The Witness: No sir. We make suggested prices.

The Court: Did you in this case?

The Witness: Not at that time. It was not discussed, sir.

The Court: I understood you to say that was one of the reasons.

The Witness: One of the reasons was that they had changed our price, they had had a meeting and, as a group, decided to change our price.

432 The Court: Did you fix the price, did your company fix the price at which the wholesalers should sell your products?

The Witness: We have a suggested price, your Honor. They usually conform with that.

The Court: You expect them to conform with it?

The Witness: They usually do.

The Court: But they had changed that?

The Witness: They had changed that, yes, sir.

The Court: That is one of the reasons you quit sending into Indiana?

The Witness: Well, no, not just because they changed the price, sir, but they had had a meeting as a group and decided to change the price. That was the information I received.

The Court: How would that affect you?

The Witness: Well, it would not affect me, but it might affect our company legally as a group deciding on what our prices should be.

The Court: But if you were not a party to it, it would not affect you.

433 The Witness: Well, I did not know, sir.

Q. (By Mr. Daniels.) But the only reason that Calvert ceased sending whiskey to Kiefer-Stewart and the other Indiana wholesalers, is the reason you have given, isn't it?

A. Yes, sir, I would say that would be one of them; there could be others.

Q. There could be? Would you name one?

A. I don't know of any others.

Q. You never have shipped whiskey to Kiefer-Stewart from that date to this, have you?

A. No, sir.

Q. When you were talking with Mr. Baker and Mr. Lutz before the middle of November, do you know down here at the Harrison Hotel, I will ask you if you did not say to them that you wanted to get Calvert, that you wanted, Calvert wanted to get it to this State in a good way with a good distributor, you were not concerned with the prices the wholesalers filed on their products?

A. No, sir, I had no authority to say that.

434 Q. You never discussed that subject at all?

A. Prices?

Q. Filings. Didn't you know by November 12th that Kiefer-Stewart had filed these new prices with the 15 per-cent over-all markup?

A. Not on our product, no, sir.

Q. You knew it had filed on other products?

A. I would not say I knew. I assumed they did.

Q. You were the general manager of the whole midwest?

A. I have seven States.

Q. Did you keep yourself advised of the filings of the Indiana wholesalers?

A. We have statisticians that handle that.

Q. Didn't you keep yourself advised of the price filings of the Indiana distributors?

A. Of course.

Q. Then you knew they had filed on the 12th of November, you knew they had filed this increase?

A. Sir, I assumed they had filed. Kiefer-Stewart was not a jobber of mine.

Q. You were getting into an arrangement with them to have them a jobber, is that correct?

435 A. That is correct.

Q. Therefore, you were concerned with their price filings?

A. They did not have our suggested prices for the cost of our product.

Q. What would that have to do with their own filings?

A. It might influence their prices on the street.

Q. Their prices on the street was a markup, whatever the cost to them.

A. I assumed so.

Q. You knew they had filed this OPA scale of 15 percent and made it apply to all of their costs, didn't you?

Mr. Paul Davis: Your Honor, I object to that question.

It assumes a fact which is not true. It is not OPA—

Mr. Daniels: (Interposing.) 15 percent, the same thing.

Mr. Davis: Percentage?

Mr. Daniels: Strike it out.

Q. (By Mr. Daniels.) You knew they had filed a price filing charging their prices at 15 percent above their
436 entire cost to them?

A. Sir, I did not know. I assumed it because I heard all of them had done it.

Q. Did you mention that to them at that November 12th meeting where you arranged for the November 23rd sales meeting?

A. No, sir, nor did they discuss it with me.

Q. You made no complaints to them of their price filings?

A. No, did not even discuss it.

Q. You did not call Gollin about it from New York, and discuss it with him?

A. Not on prices, no.

Q. You remember he or Mr. Lutz did get on the Long Distance telephone that day and talk with him?

A. I called Gollin; Mr. Lutz or Mr. Baker did not talk to them. I talked to Gollin.

Q. You alone, talked to him?

A. Yes, sir.

Q. What did you talk to him about?

A. About shipments.

Q. Talk about the November 23rd meeting?

A. I asked if we expected to make deliveries; he

437 said as far as he knew. I conveyed that information to Mr. Lutz and to Mr. Baker.

Q. Did Mr. Gollin make any comment about the Kiefer-Stewart price filings?

A. No, sir.

The Court: Was that before or after Seagram had purchased the other company?

Mr. Daniels: Long before, your Honor.

The Court: It was after Seagram had purchased the common stock of the Calvert Company?

Mr. Kiernan: April 19, 1945 was the date of the purchase of the stock. It was in November of 1946, a year and a half later.

Q. (By Mr. Daniels) You are very clear, though, that Mr. Lutz and Mr. Baker did not get on the telephone when you had Mr. Gollin in New York. You are sure of that?

A. Sir, as far as I can recall, nobody talked to Gollin except myself.

Q. Is it possible Mr. Baker or Mr. Lutz did pick up 438 the phone and talk to him?

A. It is possible. I am almost positive it did not happen.

Q. You are equally positive that the whole tenor of that conversation was about the sales meeting of the 23rd?

A. Yes, sir.

Q. And Kiefer-Stewart becoming a Calvert distributor?

Mr. Daniels: I think that is all.

Mr. Kiernan: One more question, Mr. Schwalb.

Q. Is Mr. Gollin still connected with the Calvert Company?

A. No, sir.

Q. Is he working for someone else now, do you know?

A. I believe he is, sir.

Q. Nobody connected with either Calvert or Seagram, some third distiller that has no connection with Seagram or Calvert?

A. That is right.

Q. Do you know where he is working?

A. I hear he is working for Schenley.

Recess.

439 WILLIAM W. WACHTEL, a witness called on behalf of the Defendants, being first duly sworn, testified as follows:

Direct Examination by Mr. Kiernan.

Q. Will you state your full name and address for the record, sir?

A. William W. Wachtel, 15 West 81st Street, New York City.

Q. What is your position, Mr. Wachtel?

A. I am President of the Calvert Distillers Corporation.

Q. How long have you occupied that position?

A. Since 1937. Prior to that time I was Vice President from 1936.

Q. Do you recall the withdrawal of OPA ceiling prices from whiskey in the month of October, 1946?

A. I do.

Q. Do you recall having had any conversation with Mr. Barrett Moxley in the month of October, 1946?

A. No, sir.

Q. Do you recall when shipments of Calvert
440 merchandise were discontinued to Indiana wholesalers?

A. I do.

Q. Who made the decisions to discontinue the shipments of Calvert merchandise to all wholesalers in the State of Indiana?

A. I did.

Q. And upon what did you base that decision?

A. I had received field reports from my staff to the effect that there was alleged to be a collusive effort on the part of the wholesalers to advance prices. I also heard a more disturbing report which was to the effect that the wholesalers were in somewhat of a collusive effort with the retailers for them to also mark up prices. I realized that that was an illegal act.

Mr. Daniels: I move to strike out what he realized. He is asked to state facts, not to make a speech.

The Court: Tell what—

The Witness: (Interposing) I considered it an illegal act and I immediately stopped shipments into the State of Indiana.

441 The Court: Have you ever resumed shipment?

The Witness: Yes, sir.

The Court: When?

The Witness: When the matter was finally settled. I think the evidence previously testified, your Honor, has already stated I don't recall the exact time. My job is more or less to set policies rather than operate the details of the business.

Q. (By Mr. Kiernan) Would February, 1947 approximately be it?

A. I think that is about the right time.

Q. Now, of course you have nothing to do, as I understand it, with the arrangements which had been discussed with Kiefer-Stewart in October and November of 1946?

A. No, sir.

The Court: Are you selling to them now?

The Witness: No, sir, never have. At no time have we ever sold them.

442 Q. (By Mr. Kiernan) You took an order.

A. Took an order, it was never filled.

Q. Mr. Wachtel, are you familiar with the practice in the liquor industry regarding these distributorship arrangements?

A. Yes, sir.

Q. Will you tell us what the custom and practice is with respect to the terms of these distributorships?

A. Well, we have no written or verbal obligation as to time; we appoint a distributor with the understanding that if the arrangements are satisfactory, mutually, we will continue to do business with them. We don't guarantee any length of time, nor do we even specify how much notice we will give them should we care to terminate the agreement.

Q. The distributor is at the same liberty to terminate his arrangement without giving any notice?

A. Yes.

Q. So the only obligation you ever assume is with respect to any orders?

443 Mr. Daniels: Your Honor, we object—purely argumentative.

Mr. Kiernan: I will withdraw it.

Q. Did you ever accept more than one order from Kiefer-Stewart & Company?

A. Not to my knowledge.

Q. Had Calvert Distillers Corporation increased its

prices to Indiana wholesalers in either October or November, 1946?

A. No, sir, we have never changed our prices anywhere in the United States to my knowledge, from the day we started in business outside of the increase in Federal and State taxes.

Q. In October or November of 1946 did you make any suggestion to wholesalers and retailers as to what Calvert's policy was to be with respect to its own price structure?

A. We did. As a matter of fact, I went out on a limb so far as to write an advertisement, if I remember correctly, over my own signature, to the trade in which I called attention to the fact that the Government was asking all manufacturers to avoild inflation, not to increase
444 the cost of living, either of necessities or luxuries.

We had not advanced our prices although we were fully entitled to do so. As a matter of fact, we were entitled to increase our prices somewhat, even under the OPA ceilings and we did not do so as a matter of principle.

The Court: You could?

The Witness: Yes, we could do so, a differential of sixty some odd cents between prices set in 1934 and what OPA had set.

The Court: You could not increase over OPA.

The Witness: No, we were under the OPA. We could probably have earned another three or four million dollars for the five or six years those restrictions were in effect.

Mr. Daniels: If the Court please, I move to strike that out.

The Court: It is all right, let it stay in.

Mr. Daniels: It is argumentative.

Q. (By Mr. Kiernan) Of course, had you in-
445 creased the price to the wholesaler, what would the effect of that have been on the consumer, Mr. Wachtel?

A. Well, if you are talking dollarwise you have to answer the question a little differently. The increase in the price from the wholesalers to the retailers?

Q. No, I am talking now, had there been an increase in your price to the wholesalers, would that have affected the price to the wholesaler?

A. Yes, sir.

Mr. Daniels: Your Honor, I am going to object.

The Court: It is a natural result.

Mr. Daniels: It is obvious.

The Witness: I would like to tie together two important things that happened, an advance in the price—

Mr. Daniels: (Interposing.) I object to the witness testifying without a question.

Q. (By Mr. Kiernan.) Let me ask you this, Mr. 446 Wachtel: Of course, if the wholesalers had increased their prices that also would have resulted in consumer increase?

A. Yes, sir.

Q. The same is true of the retailers?

A. Yes, sir.

Q. Your stated policy is as you have given it to us?

A. Hold the line, it would have resulted in an increase of somewhere between forty and fifty cents per bottle of whiskey and may I add that the—

Mr. Daniels: (Interposing.) No, your Honor, I am going to have to ask you to admonish this witness to stop making speeches.

Mr. Kiernan: That is all.

447 *Cross-Examination by Mr. Daniels.*

Q. Your policy was to withhold the sales of Calvert liquor to wholesalers that would not adopt your suggestion of prices, wasn't it?

A. No, sir.

Q. What was it?

A. We had a price structure, a price structure had been established in 1934. That was the history of the price structure.

Q. I am not asking for the history of the price structure. I am asking you what your policy was when you cut off supplies of your liquors to Kiefer-Stewart and the other Indiana wholesalers in November, 1946.

Mr. Paul Y. Davis: Your Honor, I object.

A. That was collusive effort between the wholesalers to effect a raise of prices. I did not want to go to jail.

Mr. Paul Y. Davis: Your Honor, I object.

448 Q. (By Mr. Daniels.) What you did was withhold shipment of liquor to all Indiana wholesalers?

A. To all of them.

Q. Until they came to your suggestion?

A. Until they maintained the prices they had previously sold them at.

Q. Which was your demand and requirement?

A. Which was the established price and had been for years.

Q. Isn't it true that you did not ship until they came back to the price you wanted them to charge?

A. Right.

Q. You did not come back to Kiefer-Stewart then?

A. No, sir.

Q. You had an arrangement with them in November to make them one of your stockholders, didn't you?

A. Yes, sir.

Q. You talked that matter over with representatives of Seagram, either the Seagram Distillers or Joseph E. Seagram, in New York or some other place, in November, 1946?

A. Not true. We don't discuss our policies with 449 Seagram. As a matter of fact, there is a friendly rivalry between the two companies and sometimes one sales manager does not talk to the other.

Q. So you want to say to this Court and jury you never had any conferences between officials of the Calvert Company and any Seagram officials of any Seagram company with respect to the deliveries or non-deliveries of liquors to the Indiana wholesalers or Kiefer-Stewart?

A. Not until after the decisions were made. Obviously, discussions were had after that, it was common knowledge, printed in the New York Times, after we had decided and published them in the New York Times and Calvert had stopped shipments to anybody. Everybody knew it.

Q. Who was at the conferences?

A. There were no conferences. I discussed it with James E. Friel, for example, treasurer of my company, also of Seagram.

Q. There were no conferences?

A. Not necessary. I decide my own policy.

Q. If Mr. Friel said, under oath, there were conferences—

450 A. (Interposing.) I don't think he meant it that way.

Q. I want you to answer my question.

A. I was not here, I did not hear the previous testimony.

Q. Will you answer this very simple question, Mr. Wachtel, if Mr. Friel, under oath, stated that there were

conferences between the Calvert officials and the Seagram officials with respect to the delivery or non-delivery of Calvert and Seagram whiskey to Indiana wholesalers and to Kiefer-Stewart & Company, you want to repudiate that statement? Is that correct?

A. No; if he said that those conferences were before the act, I would repudiate it, because it is not true. If he says it is after the act, I will accept the statements, there were plenty of conferences.

Q. What was the reason for the conferences?

A. We merely exchange information between one company and the other; Mr. Friel is an officer of my company; I am in perfect willingness—

Q. (Interposing.) Also an officer of the Seagram Company?

A. Right, he is the treasurer.

Q. You only had those conferences with him and ~~451~~ the others to exchange information?

A. After the act, that is correct. That is the way we run our Calvert business.

The Court: Calvert owns Seagram?

The Witness: Yes, sir, a hundred per cent.

The Court: That is the company with which you are connected?

The Witness: Yes, sir.

The Court: The one in which Seagram owns a hundred per cent of the stock?

The Witness: Yes, sir.

The Court: Of course, under those conditions Seagram would have a good deal to say about the policies.

The Witness: No, each of the sales companies determine their own policies.

The Court: Regardless of the fact that Seagram owned it a hundred per cent?

The Witness: It depends on which you are talking about. If you are talking about the sales corporation,—

~~452~~ The Court: (Interposing.) I am talking about the defendant.

Mr. Paul Y. Davis: There are two defendants.

The Court: There are Seagram Sales?

The Witness: Yes, sir, Seagram Distillers are the sales; Calvert is a sales company, and the two do not discuss their policies.

The Court: I understood there was no dispute but that Seagram did buy all of the common stock of Calvert.

Mr. Paul Y. Davis: Joseph E. Seagram.

Mr. Kiernan: They did not buy it, but they merely exchanged the stock of another company for it.

The Court: That is one way of buying it, isn't it?

Q. (By Mr. Daniels.) Now, I understood you to say, Mr. Wachtel, that you never at any time discussed with Mr. Moxley by telephone or otherwise the fact that Kiefer-Stewart, that there had been arrangements made for 453 Kiefer-Stewart to become an Indiana distributor of Calvert products?

A. No, I did not answer the question that way. You asked it differently.

Q. I am asking the question now.

A. All right, and I will answer.

Q. Did you at any time communicate with Mr. Barrett Moxley, President of Kiefer-Stewart, with reference to the arrangements for Kiefer-Stewart becoming a distributor of Calvert products in Indiana?

A. After the act, yes, sir.

Q. After what act?

A. After he had been accepted as a prospective Calvert distributor, I happened to be in Chicago, I was in the office when my sales manager was talking to him on the telephone, and I have a vague recollection of passing the time of the day with him on the telephone. That is the only time I can recall that we discussed that particular thing.

Q. Do you recall congratulating him on his connection with the company?

454 A. It is possible I did. I have always had a high regard for him.

Q. It was a week after that that Kiefer-Stewart was notified that the whole arrangement was off, that there would be no shipment of Calvert whiskey?

A. I can't testify as to the time, but that act took place.

Mr. Daniels: That is all.

455 *Redirect Examination by Mr. Kiernan.*

Q. Is it likely that you may have discussed this matter with Mr. Bromphman after the shipments were stopped?

Mr. Daniels: Your Honor, I object.

The Court: Go ahead.

A. I discussed it with him not until the act had taken place.

Q. Do you recall whether you did or not?

A. I don't particularly recall, no, sir.

Q. Do you recall anyone else you may have talked with?

A. Yes, I discussed it with Mr. Friel, told him what we had done.

Q. I mean anyone besides Mr. Friel.

A. I may have talked to General Schwengel.

Mr. Kiernan: That is all.

Mr. Daniels: General Schwengel is President of the—

The Witness: (Interposing.) Joseph E. Seagram
456 which is the American holding company of the others.

Mr. Daniels: You regard Mr. Friel as an upright, honest gentleman?

The Witness: Of the highest order.

Witness Excused.

457 VICTOR A. FISCHEL, a witness on behalf of the Defendants, having been previously sworn, was recalled and testified further as follows:

• *Direct Examination by Mr. Kiernan.*

Q. Mr. Fischel, when you were asked on cross-examination whether you had discussed anything with any of the officers of the other companies, do you wish to make a correction in your testimony?

A. Yes, sir. When I was asked the question, I understood prior to the 6th of November, that I was asked whether I had any discussions with Calvert or any Calvert directors. I definitely made the statement, no, I had no discussions whatsoever, but after the 6th of November, I did have a discussion with Mr. Friel to advise him of the action that we were putting in force in discontinuing doing business with all Indiana wholesalers, but not prior to that time.

Mr. Kiernan: That is all.

Cross-Examination by Mr. Daniels.

Q. You understood that my question related to a time before November 6, Mr. Fischel?

A. I understood it to relate to any time from the beginning of this discussion up to November 6, not after.

Q. Now, you have discovered during the recess that 458 you did have a conversation with some Calvert people after that time?

A. Mr. Friel, yes, sir.

Q. You want to correct your testimony?

A. That is correct.

Q. You talked to somebody about it during the recess?

A. Yes, sir, I did.

Q. Whom did you talk to?

A. My counsel.

Q. You talked to counsel?

A. Yes, sir.

Q. Did you talk to Mr. Friel?

A. No, sir.

Q. He isn't here?

A. No, sir.

Q. When did he leave?

A. I don't know, sir.

Q. He was here this morning?

A. Yes, sir.

Q. He is not here now?

A. No, sir.

459 Q. Did you talk to Mr. Wachtel about it?

A. No, sir. Oh, I talked to Mr. Wachtel after I talked to the counsel, that I was going back on the stand.

Q. You told Mr. Wachtel you were going back to the stand and change your testimony?

A. I didn't tell him what I was going to do.

Q. What did you tell him?

A. I just said I was going back on the stand; not the details.

Q. Did he ask you why?

A. No.

Q. Did he say what he was going to testify to?

A. No.

Q. You didn't discuss that?

A. No.

Q. Just discussed with counsel?

A. That is right.

Q. No other member of the Calvert, Seagram or Calvert organization?

A. That is right.

460 Q. During the recess?

A. That is right, sir.

Mr. Daniels: That is all.

Mr. Kiernan: That is all.

Witness excused.

461 TUBIE REZNIK, a witness called on behalf of the Defendants, being first duly sworn, testified as follows:

Direct Examination by Mr. Kiernan.

Q. Will you state your full name and address for the record, please?

A. Tubie Reznik, 262 Central Park West, New York City.

Q. What is your occupation, Mr. Reznik?

A. I am Vice President and General Sales Manager of Calvert Distillers Corporation.

Q. Did you occupy that position in the fall of 1946?

A. Yes, sir.

Q. And continuously since that time you have occupied that position?

A. Yes, sir.

Q. Do you know Mr. Barrett Moxley, the President of Kiefer-Stewart Company, the Plaintiff in this action?

A. Yes, sir.

Q. How long have you known him?

462 A. Quite some time. I knew him before I was in the liquor business or before I was with Calvert.

Q. Had you been in the drug business before you came with Calvert?

A. Yes, sir.

Q. What firm were you connected with?

A. McKesson & Robbins.

Q. Was it through the drug business that you became acquainted with Mr. Moxley?

A. Yes, sir.

Q. So your acquaintance with him goes back many years?

A. Yes, sir.

Q. Did you have a conversation on the telephone with Mr. Moxley in October of 1946 about Kiefer-Stewart & Company becoming a Calvert distributor in Indiana?

A. I am quite sure I did, very sure, because through the months of '46, I talked to Mr. Moxley on the telephone several times.

Q. Well, specifically now directing your attention to the month of October, do you recall that there was a meeting of the Indiana Wholesale Liquor Dealers Association at French Lick Springs in that month?

A. Yes, sir, very definitely.

463 Q. Do you recall that shortly after that you had been advised that some discussions had taken place between Mr. Moxley, Mr. Lutz and Mr. Baker, representing Kiefer-Stewart, and representatives of Calvert?

A. Yes, sir, even advice to the extent that every conversation was discussed with me afterwards. I was, in that period, in New York and in California.

Q. Well, now, do you recall specifically, telephoning Mr. Moxley to say anything to him as the result of the conversations which had taken place between himself and the Calvert representatives at French Lick?

A. I would not be sure of the place, sir, but I am sure of the conversation. I had a conversation with our people at which Mr. Moxley was there; I think one of our people instituted the call and I think I was still in California when they told me of the arrangements that they were about to conclude with Mr. Moxley and at that time I asked, or Mr. Moxley at the other end, asked to speak to me, sir.

Q. Can you fix the approximate time of that, was it the latter part of October or some time in November?

464 A. If I can look at my records I could, but my guess would be that it was the latter part, sir.

Q. Of October?

A. Yes, sir.

Q. Tell us the conversation as you now recall it.

A. Well, our people on the phone told me that he had concluded the arrangements, that they had concluded the arrangements, that the Kiefer-Stewart was going to take on the line and we were going to ship it.

Q. Was there any number of cases mentioned?

A. I think it was two thousand, sir. I would not be too sure of it. Mr. Moxley on the telephone told me, or alluded to the fact that it should be more or can it be more, when can he see me, can it be more.

Q. Well, did you say anything to him about congratulating him upon becoming a Calvert distributor?

A. Yes, sir, I congratulated him and told him I was very glad he was with us. When he kept pressing the question or subject of can it be more, I told him that Mr. Schwalb, or Mr. Gollin—I have forgotten which one it was, whatever they told him, that was it.

465 Q. Now, you did not participate in any of the subsequent conversations which took place between the Calvert representatives and the representatives of Kiefer-Stewart, either on the 5th or 6th of November or the 11th or 12th of November, did you?

A. Not directly, except I was informed.

Q. You were informed as to what was going on, but you did not directly participate?

A. No, sir.

Q. Now, do you recall that on or about the 19th day of November, 1946, you were in Chicago with Mr. Schwalb?

A. Yes, sir.

Q. Did you give Mr. Schwalb any instructions on that day?

A. Yes, sir.

Q. What were those instructions?

A. Subsequent to my coming to Chicago, I had direct reports from our men which would be—

Mr. Daniels: (Interposing.) Just a moment.

Q. Let's just talk about the instructions that you 466 gave Mr. Schwalb.

A. That he is to notify every wholesaler in the State of Indiana, including Kiefer-Stewart, that we are not shipping merchandise to Indiana.

Q. Did you tell him the reason why he was to give that order?

A. Yes, sir, gave him the words to use, in fact.

Q. What did you tell him?

Mr. Daniels: I object to what he told him, what he heard Schwalb tell Mr. Moxley is all right.

Mr. Kiernan: Let it go out.

Q. Were you present when Mr. Schwalb put in the telephone call to Mr. Moxley?

A. Yes, sir.

Q. Did you overhear Mr. Schwalb's end of the conversation when he was talking to Mr. Moxley on the telephone?

A. Yes, sir.

Q. What did you hear Mr. Schwalb say?

A. To the best of my recollection, very brief, Mr. 467 Schwalb told him, "We are not shipping Kiefer-Stewart or any other wholesaler in the State of Indiana, our line."

Q. Of course you did not know what Mr. Moxley said on the other end.

A. No, sir.

Q. Did you hear Mr. Schwalb say anything about the fact that Calvert was doing this because it had to adhere to the Seagram policy?

A. Definitely not, sir.

Q. Now, consequent to that incident, did you, yourself, talk directly on the telephone with Mr. Barrett Moxley?

A. Yes, sir.

Q. Do you recall whether it was on the same day or was it on a subsequent day as the conversation you have just described?

A. I am not quite sure it was on a subsequent day.

Q. Do you recall where you were when you talked with him on the telephone?

A. Once I am sure of New York and I think also once from Chicago.

468 Q. In other words, you had two telephone conversations with him?

A. Yes, sir.

Q. The first time that you talked with him, will you tell us about when it was? Was it a day or two days or five days later?

A. It could not have been over five or six days later because on my return to New York, sir,—

Q. Will you tell us what conversation you had on the telephone with Mr. Moxley on that occasion?

A. Well, to the best of my recollection Mr. Moxley asked me when we are going to ship and why we had not shipped.

Q. By the way, did you call him or did he call you?

A. He called me, sir.

Q. What did you tell him?

A. And I told him that when I could not tell him, the

why I told him very definitely, that reports that have come to me from our sources, meaning our men, individual men in the State of Indiana, our State manager in Indiana, and from Mr. Schwalb, that the wholesalers of the State of

Indiana have collectively raised our prices which I
469 interpreted as collusion among them, and for that reason, to avoid being a part of any collusion or conspiracy, we are going to stop shipping everybody, including Mr. Moxley's new order.

Q. Did you tell him you had discussed that matter with Mr. Wachtel?

A. Yes, sir, I should not add emphatically. I don't recall that I did. I don't recall he asked me. I do recall he asked if Mr. Wachtel was in. I do recall at that time Mr. Wachtel was not.

Q. The fact you had discussed with Wachtel?

A. Yes, sir.

Q. The decision, you conveyed to Mr. Moxley in that telephone conversation, had been decided between you and Mr. Wachtel previously?

A. Yes, sir.

Q. Now, what did Mr. Moxley say?

A. Mr. Moxley talked considerable, just about everything.

Q. Well, tell us, don't characterize his statement, tell us as best you can now recall it, what he said.

A. Well, he attempted to tell me that my information was wrong.

Mr. Daniels: Just a moment, your Honor. We object to what he attempted to tell you.

A. He did tell me that my information is wrong, and that all these things did not happen, and that there was nothing to it, and that I and we have made a bad decision, meaning we, Calvert and Wachtel and Reznik.

Q. Anything else?

A. Nothing specific that I recall.

Q. Now, did you subsequently have a second telephone talk with him?

A. I am sure I did but I am not sure in my mind whether it was in Chicago or New York, or—

Q. (Interposing.) Well, irrespective of where it was, how soon would you say it was after this telephone conversation that you have just described?

A. Again my recollection would be a matter of days, two, three, four, five days.

Q. Do you recall whether he called you on the second occasion?

A. Yes, sir.

471 Q. What did he say to you?

A. Exactly the same conversation as the first, only possibly different words.

Q. Repetition of your former conversation?

A. Yes, sir.

Q. Do you recall that he ever tried to reach you on the telephone by using the name of Dietrich?

A. No, sir.

Q. Did there come a time when you refused to talk to him on the telephone?

A. Yes, sir.

Q. Why was that?

A. After the second conversation, I just did not want to go over, all over the same conversation again.

The Court: Had you made a contract to sell them, send this to them before?

The Witness: No contract, sir. We had taken an order.

The Court: Taken an order?

The Witness: Yes, sir.

The Court: Why didn't you fill it?

The Witness: Because we discontinued shipping
472 all jobbers in the State of Indiana.

The Court: Why was that?

The Witness: The time of the shipping came in after this information had reached us from our people of the collusion, the possible conspiracy, as we interpreted it, of the wholesalers getting together to raise prices.

The Court: Did you investigate that to see whether Kiefer-Stewart had anything to do with it?

The Witness: As thoroughly as we can.

The Court: In what way?

The Witness: Through our man-power. We have a State manager and four or five men in the State of Indiana at all times, sir.

The Court: In what way would that affect you if the wholesalers raised the price? You would get the same price?

The Witness: Yes, but the fact that they would do it together and on advice of Mr. Wachtel and on advice of our resident counsel, why, I proceeded ahead, sir.

473 The Court: Then you had something to do with that, your people here. You said your local counsel.

The Witness: No, I mean our local counsel in New York. We have an attorney there that, before I make a move of any kind, that might be right or wrong, I discuss with him, sir.

The Court: All right.

Q. (By Mr. Kiernan.) Well, then, I take it that you have never discussed the matter with Mr. Moxley or anyone connected with his organization since the last conversation you told us about.

A. That is right.

Mr. Kiernan: That is all. You may examine.

Cross-Examination by Mr. Daniels.

Q. You were insisting that the Kiefer-Stewart Company and the other Indiana wholesalers fixed the price which you suggested to them, weren't you?

474 A. No, sir.

Q. File the prices?

A. No, sir.

Q. How would you put it?

A. Nothing at all.

Q. You were saying you would not deliver whiskey until they did that?

A. No, sir, I did not say that.

Q. What did you say?

A. I said raise the prices, collusively, and then we decided not to ship.

Q. As soon as they restored the old prices again, the old prices, you began to ship everybody except Kiefer-Stewart?

A. When we cut off the others we refused to ship Kiefer—

Q. (Interposing.) Answer my question, in February, 1947, when the wholesalers restored the old OPA prices, you immediately resumed shipments?

A. No, sir; I would like to answer—

Q. (Interposing.) When did you resume shipment?

A. When we discontinued shipping, we also discontinued every wholesaler in the State of Indiana as distributor. When we resumed shipping we first had to go through the procedure of appointing distributors

475

and when we appointed distributors, we did not appoint Kiefer-Stewart.

Q. You never have delivered them any liquor, have you?

A. That is correct.

Q. You resumed, as you call it, as soon as the wholesalers came to your prices, didn't you?

A. When we resumed shipping, when we again appointed distributors, sir.

Q. Any way you want to put it.

The Court: What prices did they fix, the same prices that you had?

The Witness: We did not ask the same prices.

The Court: The same price that you had fixed before?

The Witness: The same prices that they had been shipping, sir.

Mr. Daniels: That is what you were insisting they do?

476 The Witness: We were insisting they don't change prices collusively, sir.

The Court: What do you mean by collusively?

The Witness: Just what every jobber, the jobbers in Indiana, who are distributors, had gotten together and agreed among themselves to raise the prices and filed accordingly.

The Court: Don't they all have about the same price now?

The Witness: Yes, sir.

Q. (By Mr. Daniels.) When they filed those prices in February, you did not regard that as collusive?

A. It was the same as it had been before, sir.

Q. They all filed at the same time?

A. When the prices originally set—

Q. (Interposing.) Answer my question, they filed about the same price in February?

A. They restored the prices they had.

Q. What did you urge them to do?

477 A. We urged them to keep to the same price.

Q. You didn't regard that as collusive, you resumed shipment.

A. Because they went back to the schedule they had.

Q. When did you take this action, in your own mind, about cutting off all your distributors in Indiana, Mr. Reznik?

A. You mean exactly what day?

Q. Yes.

A. I would not know.

Q. What would you say?

A. I can look it up.

Q. You knew about this sales meeting scheduled for October 23rd when Kiefer-Stewart was to start with the line?

A. I could not tell you whether it was the 23rd, the 19th or the 16th. I could look at the record and tell.

Q. I believe you did identify to the day, this call that was made by Moxley, telling him he was no longer a distributor.

A. That day I can well remember.

Q. The 19th, you can remember that?

478 A. No, I can't remember it was the 19th. I can remember I was in Chicago when Mr. Schwalb called.

Q. How long before that time had you determined this policy that you were going to ship nothing to the Indiana wholesalers?

A. A day or two before then because we had made our minds up in New York and I came on to Chicago.

Q. Who is we?

A. Wachtel and myself.

Q. Did you have any discussion with General Schwen-gel?

A. No.

Q. Mr. Friel?

A. No, sir.

Q. Any representative of Seagram at all or Seagram Sales?

A. No, sir.

Q. Did you have any conferences at any time, from early November on, with any member or executive of either Joseph E. Seagram & Sons or the Seagram Distillers Corporation, concerning the delivery or non-delivery of liquors to Indiana wholesalers and specifically to Kiefer-Stewart?

A. Before we made our decision, no, but after-
479 wards, yes, but because it was in every trade paper and newspaper.

Q. You did not discuss it with them before?

A. I would have no occasion to.

Q. If Mr. Friel said you had those conferences, he either made a false statement or was wrong.

Mr. Paul Davis: I object to the question—purely hypothetical and an assumption of a hypothesis, not true.

The Court: You can argue that to the jury.

Q. You heard Mr. Wachtel testify?

A. Yes, sir.

Q. Your story is the same as his?

A. Yes, sir.

Q. That these discussions were after you had done these things?

A. Not with Wachtel.

Q. But with anybody connected with Seagram, it was after you had cut everybody off?

A. Yes, sir, there would be no occasion otherwise.

480 Q. But you did, both companies, the Calvert and Seagram Companies did continue to cut off the Indiana wholesalers until they came back to the old OPA prices?

A. I don't know what Seagram's action was, whether it was the exact date or the exact word, I don't know, sir.

Q. But you do know that sometime in February, 1947, after the wholesalers had restored the old OPA prices, both Seagram and Calvert resumed shipments on their liquor there to all of them except Kiefer-Stewart?

A. I, or anybody else that read the newspapers, could tell you. I could tell you exactly what we did. I could not tell you how or what Seagram did.

Q. You could not tell me whether Seagram resumed shipments?

A. Of course I can.

Q. What is the answer—did they or didn't they?

A. They did.

Q. When?

A. It is a matter of evidence they did.

Q. Why?

A. Because Seagram goods are here, it is in the newspapers.

481 Q. When did the trade paper advertising come out that you spoke of?

A. I haven't spoken of any trade paper advertising.

Q. I thought you said something about advertising.

A. I said news items in the trade papers and newspapers.

Q. What was the newspaper item?

A. Stating that Calvert Distillers had discontinued shipping to Indiana wholesalers.

Q. When were those items in the papers?

A. Subsequent to our stopping shipping.

Q. When did you stop shipping?

A. I can't tell you the exact date. I could tell you if I could look at the records or look up the dates.

Q. As a matter of fact, you did not ship at all in November, did you?

A. I would have to look up my records to be sure, sir. After the date we announced we would not ship, we did not ship, announced to our individual wholesalers that we are discontinuing them as distributors.

The Court: That was solely on the ground that they raised the price?

The Witness: Yes.

482 The Court: Why was it any of your affairs what they charged to their customers?

The Witness: Our concern was primarily because our information which we have reason to trust, was that they did it together and we interpreted it as conspiracy.

The Court: Well, you would not be a party to it if it was so, not knowing anything about it.

The Witness: Not knowing, possibly, but we did know it.

The Court: That was your only reason for not sending it?

The Witness: Yes, sir.

The Court: But other wholesalers raised the price?

The Witness: You mean in Indiana, sir?

The Court: Yes.

The Witness: My recollection is they all did, sir, on Calvert goods.

The Court: That don't mean anything to me. I don't know who they are.

483 The Witness: We had either nine or ten distributors at that time, sir.

The Court: What distributor in Evansville did you have?

The Witness: I am sorry. I am ashamed, I don't remember the name, who it was in Evansville. I think it was—

May I ask our man here?

Mr. Schwalb, who was our distributor in Evansville?

Mr. Schwalb: Hoosier Liquors.

The Witness: Then we did it to them too, sir.

The Court: Anyone in Princeton? They handle it, don't they there in Princeton, Indiana?

The Witness: Princeton, Indiana?

The Court: Never heard of that before?

The Witness: I don't think so, sir.

The Court: All right.

Q. (By Mr. Daniels.) One more question: You want to state definitely that you never said anything to
484 Mr. Moxley to the effect that you had to cut him off because you had to go along with the Seagram policy?

A. Very definitely, I did not, sir.

Witness Excused.

485 FRANK R. SCHWENGEL, a witness called on behalf of the Defendants, being first duly sworn, testified as follows:

Direct Examination by Mr. Kiernan.

Q. Will you state for the record, sir, your name and address?

A. Frank R. Schwengel, R.F.D. #4, Greenwich, Connecticut.

Q. What is your occupation at the present time?

A. At the present, President of Joseph E. Seagram & Sons, Inc.

Q. Did you occupy that position in the month of December, 1946?

A. Yes, sir.

Q. Do you recall having visited the City of Indianapolis early in December, 1946?

A. Yes, sir.

Q. Do you recall having met Mr. Moxley, the plaintiff, at that time?

A. Yes, sir.

Q. Will you tell us the circumstances under which
486 you met Mr. Moxley?

A. As I recall, I had a meeting during the day with Seagram wholesalers in Indianapolis, had called Mr. Moxley at his office for the purpose of seeing him and in the same interview, in the course of that interview, I believe I invited him to luncheon with the then mayor who was an old friend of mine. Mr. Moxley suggested that I join him at his home that evening for dinner.

Q. Do you remember the date of this, General?

A. It was early in December, somewhere around the—oh the 5th or 6th—early in December. I am not certain about the date.

Q. I believe that Mr. Moxley has fixed the date of this dinner as December 4th. Would that accord with your recollection approximately?

A. Yes, sir.

Q. Now, you went to Mr. Moxley's home for dinner on that evening, did you?

A. Naturally.

Q. Did you know who was going to be there when you went there?

487 A. Well, I assumed it was a social occasion, having known Mr. Moxley for many years, and I having extended the courtesy of luncheon the day before, I assumed that it was purely a social gathering at his home, he was extending that courtesy to me on my visit.

Q. Did you find some people there other than Mr. Moxley and members of his family?

A. Well, I hesitate talking about who was there or what happened, being a guest of Mr. Moxley's, unless there has been previous testimony in the matter.

Q. Let's put in the record just who was there in the house when you went there that night.

Mr. Daniels: It is already in the record by Mr. Moxley.

A. As I recall, his nephew, Mr. Beck—

Q. (Interposing.) Who was Mr. Beck?

A. He was one of the Seagram distributors, the gentleman who testified here today.

Q. Mr. Fansler?

A. Fansler and Mr.—

488 Q. (Interposing.) Bradford was it?

A. Bradford. Now, there may have been others, but those are about the names that I recall.

Q. Well, did any discussion arise at the dinner with those gentlemen at Mr. Moxley's house that evening?

A. Well, it started out very pleasantly—always regarded Mr. Moxley as a very generous host—but very suddenly the question of an apparent agreement—an apparent agreement among them on raising the price.

Mr. Daniels: I move to strike that out, your Honor. No evidence of that at all.

Q. (By Mr. Kiernan.) What was said?

A. You asked me how it came about. I thought it was

a pleasant evening, a social evening. Very shortly I found I was up against a very stiff argument.

Mr. Daniels: I am going to have to ask your Honor to admonish the witness—

A. (Interposing.) One of the things one of the gentlemen present said, if I attempted to do anything here contrary to their wishes they might go so far as to tear
489 down the Lawrenceburg plant brick by brick.

Q. (By Mr. Kiernan.) Who made that remark?

A. As I recall it it was Mr. Bradford.

Q. Was anything else said that you recall?

A. Well, the general discussion resulted in which I told them in my most dulcet tones because, bear in mind I was a guest—

Mr. Daniels: (Interposing.) That is perfectly outrageous, the witness can say what he said.

A. I stated to them I was much disturbed by the agreement existing among the wholesalers here for the purpose of increasing their markup which would result in an increase in price to the retailer, and a material increase to the consumer. I appealed to them—

Mr. Daniels: (Interposing.) I move to strike it out.

A. I stated to them that we were an Indiana corporation, we had a very definite and large investment in the
490 State of Indiana, that was our point of origin, we had a large number of employees, and I stated that if they persisted in that, it would cause material damage to our company and, of course, to them.

Q. (By Mr. Kiernan.) Did any of them deny that such an agreement existed?

A. There was a denial and apparent indication they did not know what I was talking about, but I withdrew as quickly as I could, after again and repeatedly establishing the fact that I was very much disturbed and the purpose of my visit which was stated clearly, was to indicate to them that their agreement was bad, that we would have no part in it. That was very definitely stated.

The Court: What agreement was that?

The Witness: An agreement to raise their markup and include in it the Federal emergency war tax which no wholesaler in the country included in his markup at that time.

Q. Now, you say when Mr. Bradford made the re-
491 mark to which you objected about tearing the Law-

renceburg distillery down brick by brick, you quickly withdrew from the party?

A. I withdrew as soon as I could without trying to prolong the argument then.

Q. Did you have a meeting the next day at the office of Kiefer-Stewart & Company with Mr. Moxley and Mr. Mayer?

A. I was called up, I believe that same evening, at my room at the hotel. Mr. Moxley apologized profusely and asked if I would meet him, I believe it was the next morning, at his place of business, which I said I would and so did.

Q. What transpired there?

A. Quite early in our discussion he called in an associate, Mr. Mayer, Kiefer Mayer.

Q. Kiefer Mayer?

A. Kiefer Mayer. I had never met the gentleman before.

Q. Did a conversation ensue between you three gentlemen?

A. Rather one-sided.

Q. Tell us what was said.

A. I stated in effect what I had stated the evening before except a little more definitely, of course, seated 492 around a table, and though it was time to lay it on the table again. I repeated that we objected and would have none of their agreement to raise the price, that it was bad and Mr. Kiefer Mayer took up the conversation. There resulted a long philosophical monologue—

Q. (Interposing.) Don't characterize the conversation, tell us what he said as best you can recall.

A. I will confess, if I heard it, I did not understand it except this: He told me that OPA control was over.

The Court: He did not talk your language, is that it?

The Witness: Well, I thought I knew something about OPA because I spent three days a week in Washington during the war. He advised me that OPA controls were off, which, of course, was elementary, but as I recall, he implied—I don't remember his exact words—but that we were on dangerous ground in discussing price with him.

I wasn't discussing price, I was discussing agreement, 493 and I actually did not know what he was talking about.

He asked me repeatedly whether I had discussed it with our lawyers. I don't recall whether I said yes or no. I had no conversation with our lawyers either before or afterwards on that score, because at this moment, I can

give you a clear account of what he said. On the way out I met Mr. Lutz, I believe, and I then came to the conclusion—

Mr. Daniels: I move to strike out what conclusion he came to.

The Court: That is all right. Go ahead.

A. I then came to the conclusion that the conversational monologue of Mr. Kiefer Mayer was to becloud the issue, that I really didn't believe that he believed what he said because I was not discussing price. I knew OPA was over. All we were trying to do was prevent an agreement. We had a stake in the livelihood of the distillers and I don't believe it has been made clear here that in connection I have nothing to do with sales and Mr. Kiefer-Stewart—

Mr. Daniels: (Interposing.) If the Court please, 494 this is just a speech, not responsive to any question.

I ask that it be stricken out.

The Court: Ask your next question.

The Witness: It has not been brought out here in so far as distributors—

Mr. Kiernan: (Interposing.) Just a moment please.

The Court: What office do you hold?

The Witness: President of Joseph E. Seagram & Sons, Inc.

Q. (By Mr. Kiernan.) Now, General Schwengel, Mr. Mayer has testified in this proceeding—

The Court: (Interposing.) Where did you get that name, General? Is that your real name?

The Witness: That is a result of thirty-three years of military service from private soldier up. Others get there quicker than I did.

The Court: I just wondered.

Q. (By Mr. Kiernan.) Mr. Mayer has testified that 495 at that meeting in the Kiefer-Stewart office he said to you, "If we agree with you and other wholesalers agree with you that they are going to carry out the OPA prices, why aren't every one of us in violation of the anti-trust laws?"

Were you asking him to agree with the price?

A. No, that is in line—what I thought was he was trying to becloud the issue, he was trying to assume I was talking price. I was talking about what I thought was an immoral agreement.

The Court: What was that?

The Witness: To get together to boost the price. As

a matter of fact, at that time if you recall, all manufacturers were asked to pledge to the government when OPA regulation went off, all manufacturers were asked not to increase their price. In behalf of our company I pledged that we would not raise our price and did not. That was earlier testified, on the majority of our items we have never raised a price, even during the days of seller's market 496 and here all of a sudden in this State, our home State, these men attempt—

Mr. Daniels: (Interposing.) I hate to interrupt him—

Mr. Paul Davis: (Interposing.) The Court asked one question.

The Court: He is trying to answer me, I guess.

Mr. Paul Davis: He is explaining why the agreement was immoral.

The Witness: What shocked me was that we were having difficulty in our own State. We thought certainly these gentlemen would listen to us. We are an Indiana corporation. We have an investment as they have. Ordinarily I don't go out on State problems, but I came here because it was so shocking I thought I was wrong, but the more days I spent here the more I saw that an agreement had been reached and they were fixing the termination which their moves later on indicated.

The Court: How would the fact that the wholesalers 497 fixed the price among themselves affect your company?

The Witness: First of all, it would make us ridiculous in the eyes of the public because we had advertised that there was no increase in the price of our commodity. Number two, if they had increased in price to the public, it would naturally and materially at that time cut the sale.

The Court: It would not affect your price.

The Witness: It would not affect our profit. It would affect our volume materially and in that way might, but that was not the real consideration. The real consideration was that, as I stated before, the fact that here an agreement had been reached that I felt in my own code—and I have been in merchandising for many years—was immoral, was wrong.

The Court: Did you take it up with any other wholesalers?

The Witness: I beg pardon?

The Court: Did you take it up with any other 498 wholesalers in the State? I say, did you take this question up with any other wholesalers?

The Witness: Yes, sir.

The Court: Who were they?

The Witness: Well, I think all of them. I believe all. I have forgotten who they were but I had a list of the wholesalers and I think I saw all of them individually.

Cross-Examination by Mr. Daniels.

Q. At that time you were not shipping any Seagram whiskey to any Indiana wholesalers, were you?

A. Now, look, I can't answer whether I was shipping on the date I was here. That the record can disclose.

Q. You don't know whether on December 4, 1946, you were shipping any Seagram whiskey to Indiana wholesalers?

A. I think we were. Will the record disclose that?

Q. I am asking you, General, to see how much you know.

A. I don't know.

Q. When did you discontinue shipments of whiskey to Indiana?

499 A. I don't know.

Q. Have you any idea at all?

A. I would not know the exact date.

Q. When did you resume?

A. I believe we missed the holiday trade.

Q. When did you resume shipments?

A. I think after the first of the year.

Q. Why did you resume shipments?

A. Because I think the distributors here finally saw the light of day.

Q. As you had laid it down to them, as you had explained it to them?

A. Well, they broke their agreement with each other.

Q. They saw the light of day as you had given it to them?

A. No, not because I did not dictate any price.

Q. They did what you said.

A. Not because I said so.

The Court: Did they change their price after you were here?

The Witness: No, they did not increase the markup.

500 The Court: I say did they change it?

The Witness: There was no change necessary, they just went along evenly at the same price.

The Court: At the price you had suggested?

The Witness: I never discussed price with them, sir. They wanted, their agreement was to increase the markup. I believe we started to ship them.

The Court: That would affect the price, of course.

The Witness: Yes, but there was no discussion of price on my part. It was merely, my entire philosophy and approach to them was based on the wrongfulness of the agreement.

The Court: But all fixed the same price, the same markup?

The Witness: Then they all went under the fair trade law. They left their prices alone, I believe. I am sorry I can't be more specific because I am not in the sales end of it.

501 The Court: Did that exclude the plaintiff or not?

The Witness: Well, he was never put back on the list.

The Court: I mean he did not get your product after that at all?

The Witness: He never got back on the list. Bear in mind we have no contract. All agreements with our distributors are oral.

Mr. Daniels: Just a moment. That has nothing to do with it.

Mr. Kiernan: Just answer the questions Mr. Daniels puts to you.

Q. (By Mr. Daniels.) You resumed your shipments, as I understand it, as soon as the wholesalers went back to the prices you felt they should have adhered to?

A. Again I don't—you are asking from a technical standpoint, I would say no. We re-shipped when the wholesalers indicated, I understood from our sales department, and that is second-hand information.

Q. Indicated they had seen the light and were going to the OPA prices?

502 A. OPA had nothing to do with it, when they ceased to have an agreement.

Q. Don't you know all they did was to file the old schedules? You know that, General.

A. Yes, I suppose.

Q. Then you began to ship except Kiefer-Stewart.

A. I can't answer that definitely. I had nothing to do with the resumption. I have nothing to do with sales because our sales departments are absolutely—it may

sound unbelievable to you—but are absolutely independent of each other.

Mr. Daniels: I have heard that.

The Court: The thing I can't quite understand is why it was any of your affairs what they charged to their customers.

The Witness: I beg pardon?

The Court: I say, the thing I can't quite understand is why it was any of your business what they charged for liquor after you got your price out of it.

The Witness: Well, in today's merchandising it is the manufacturer's business. He has a very serious obligation to the public. For example, under fair trade laws today, the manufacturer feels that prices will gradually be more favorable to the public. Other economists may say the fair trade laws increase the price to the public. More and more the manufacturer has an obligation to the public at which his commodity is sold and every manufacturer seeks to deliver that commodity at the most favorable price to his public, taking into consideration a fair and liveable profit to the wholesaler and a fair and liveable profit to the retailer and the markups are just based on the discussion, not maybe for the record, the markups in the distilling business are very fair because we feel that the more money a wholesaler makes, a retailer makes, and a tavern keeper makes, the more he will observe the moral code, the more he will pay attention and run his business properly. The minute he loses money he goes off the reservation.

Mr. Daniels: Are you still answering the Court's question?

504 The Witness: No. No, I stepped off the record.

Q. (By Mr. Daniels.) Do you know this much about the sales end of your business, General, of which you are President, that your company did very soon after they resumed shipments, made fair trade contracts with some of your wholesalers? Do you know that?

A. I assume they did.

Q. Do you know some of those fair trade contracts are to fix a minimum price at which these liquors are to be sold?

A. Yes, sir, the fair trade laws permit that.

Q. You fixed the identical prices you had been urging on the wholesalers to accept.

A. That may be true.

Redirect Examination by Mr. Kiernan.

Q. You did not come to Indiana for the purpose of discussing this?

Mr. Daniels: I object to the question, absolutely leading.

Q. What was the purpose of your visit to Indiana in December?

A. In December?

Q. '46.

A. Well, to discuss with them an agreement which I thought was wrong, to dissuade them.

Recross Examination by Mr. Daniels.

Q. How did you know there was an agreement? Tell me how you knew. What facts did you know?

A. I heard it in New York from the world.

Q. Whom did you hear it from?

A. Everybody.

Q. Tell one person.

A. I heard it from here, it was common gossip.

Q. Will you name one person you heard it from?

A. I think you will find a reference to it in the Journal of Commerce of New York if you want a reliable source of information to what was happening here.

506 Q. I will ask you once more. Answer my question. Name me one person that you heard that from.

A. Well, I can't fix it on any individual person, there were so many of them.

Q. Let me ask, did you personally make any investigation of the facts—you personally?

A. That is what I came down here for.

Q. Whom did you talk to?

A. I talked to Barrett Moxley.

Q. Before you came out here for that purpose, did you make any investigation of the facts?

A. My purpose in coming out here was the information I had received in New York which was wide, broad and general.

Q. Name one person from whom you got that information.

A. I can not specifically mention one person, but I can give you the reference to it.

Q. That is all. You can't name one person.

A. The New York Journal of Commerce.

Q. That is the person you name?

A. That is one of the sources, or any newspaper man in Indianapolis.

507 Mr. Daniels: That is all.

Witness excused.

The Court: Do you have many more witnesses?

Mr. Paul Davis: The Defendants rest, your Honor.

508 WALTER LUTZ, a witness called on behalf of the Plaintiff, having been previously sworn, was recalled and testified further as follows:

Direct Examination by Mr. William G. Davis.

Q. You are the same Walter Lutz who previously testified in this case?

A. Yes, sir.

Q. Mr. Lutz, you heard Mr. Sam Bernbach's testimony earlier today?

A. Yes, sir.

Q. You heard him refer to a conversation which he said he had with you in November, 1946?

A. Yes, sir.

Q. I don't have the notes, Mr. Lutz, but Mr. Bernbach testified, in effect, that you said that the wholesalers in Indiana had agreed upon prices, or upon markups for distilled products which they handled. Did you make any such statement to Mr. Bernbach?

A. Not to Mr. Bernbach or anybody else.

509 Q. Are you certain of that, Mr. Lutz?

A. Positive.

Q. Mr. Lutz, there was testimony here that a distiller who did not file fair trade contracts could not advertise his products. Do you know whether or not that is true?

Mr. Paul Davis: Just a moment, I object to the witness's testimony on that subject.

The Court: That is objectionable, I think.

Mr. Daniels: A matter of law, we can establish it is not true.

The Court: We have got some regulations on that.

Mr. William Davis: That is all.

Cross-Examination by Mr. Paul Y. Davis.

Q. Did you talk to Mr. Bernbach?

A. I don't even remember talking to him.

Q. So you don't remember anything about that conversation. As far as you know it did not occur.

510 A. If there had been any conversation, there would not have been anything about prices in it.

Mr. Paul Davis: I move to strike the answer.

The Court: Let it go out.

He wants to know if you had any conversation.

A. I don't remember any conversation with Sam Bernbach.

Q. (By Mr. Paul Davis.) You don't remember how you learned Seagrams were not going to ship any more?

A. No, sir.

Q. But you did know it?

A. I was probably informed of it.

Mr. William Davis: Do you consider that proper cross-examination?

Mr. Paul Davis: Yes, I do.

The Court: Did they ship you any more?

The Witness: No, sir.

The Court: Haven't yet?

The Witness: No, sir.

Mr. Paul Davis: That is all.

511 The Court: Do you have anything more?

Mr. Daniels: We have nothing further.

The Court: Do you have anything else?

Mr. Paul Y. Davis: We have nothing else, your Honor.

The Court: Now, that concludes the evidence. I am willing to abide by the wishes of the jury and the lawyers, whether or not we should continue this in the morning. Tomorrow is Saturday. I have nothing for Monday. If you want to come down in the morning and argue the case and present it to the jury so they can go home and be excused, then next Tuesday is when I will need them again. I will be glad to meet your convenience.

Mr. Daniels: Shouldn't we ask the jury? Maybe they would rather have Saturday off. It would suit me a little better—I will do whatever the Court wants—it would be a little more convenient to me because of another engagement if we could have tomorrow off.

The Court: I have Monday open but my motion
512 was if we could finish it, then the jury could be excused until Tuesday of next week and they could go home.

(One of the jurors suggested the case be finished tonight.)

The Court: That is going a little too far, but if the attorneys feel they would as lief come in the morning—tomorrow is Saturday—and finish the case, then you will be excused when you get through with the case until Tuesday.

Mr. Davis: Your Honor, I want to say my own preference is somewhat like counsel for plaintiff, but I don't think either one of us wants to get on the spot with the jury.

The Court: I suspect we had better adjourn until Monday morning if that isn't too distasteful to you. Then, until Tuesday morning.

So, if you have no objection we will just adjourn until Monday morning. I think it is better for the lawyers and the jury too, perhaps, because this is a different
513 kind of a case from some cases that we have and naturally will take some time for the lawyers to prepare their argument and their instructions to present to the Court, and I would like to have those instructions that you want to tender as early as you can get them to me. As I say, I have a good many of them here that I have used heretofore but this is a somewhat different case. Monday morning will be all right. Is that satisfactory to the gentlemen?

Mr. Kiernan: Yes, your Honor.

The Court: Is that all right with the jury?

(The jury indicated it was.)

The Court: Then we are going to adjourn until Monday morning. You have had a pretty hard day and it won't hurt you to rest up a little tomorrow. During the time that you are separated, and you will be permitted to be separated over the week-end; I want to caution you
514 again not to talk with anyone about the case or permit anyone to talk with you about it or to consider what your verdict is going to be. That means that you should not talk between or among yourselves at this time because you might have one notion now and you might have another after the arguments and after the instructions. So wait until the case is finally concluded before you

talk with anyone about it or consider what your verdict will be and if you will come back promptly at ten o'clock Monday morning we will agree not to keep you any longer than is necessary to dispose of this case.

Whereupon the Court adjourned at five-forty o'clock p. m. to reconvene at ten o'clock Monday morning.

515

Indianapolis, Indiana,
Monday morning—10:00 o'clock,
May 23, 1949.

The Court: Did you have another witness, Mr. Davis?

Mr. Paul Davis: If the Court please, I think both parties have rested.

Mr. Daniels: We have rested, your Honor.

(Mr. Daniels summed up to the jury on behalf of the Plaintiff.)

(Mr. Paul Y. Davis summed up to the jury on behalf of the Defendants.)

(Mr. Daniels made his final summation to the jury.)

(The Court then instructed the jury as follows:)

516

Court's Instructions.

Ladies and Gentlemen of the Jury: You have listened patiently to the evidence in this case and to the arguments of the lawyers, and now in the regular course of procedure, it becomes my duty to explain to you the law which governs the case in order that you may apply that to the facts as you may find them to be from the evidence. Keep in mind that you are the sole judges of the facts and of the weight and credit to be given to the testimony of the witnesses as they have appeared upon the stand, but, insofar as the law is concerned, you are to accept that as the Court may give it to you.

I want to caution you at this time that if, during the course of these instructions the Court in a general way should deem it necessary to review some of the evidence, and to refer to the testimony of some of the witnesses, such reference should not influence you in arriving at your verdict.

I might say at this time that so far as I have in mind,

I shall not review any of the evidence, unless it is in a very short form, because it is your responsibility to determine the facts from the evidence and the circumstances surrounding the evidence, such evidence as has been adduced upon the trial of this case, uninfluenced, unbiased by any statement of the Court or by the counsel.

This action was begun by the filing of a complaint. The things that I say to you with reference to the complaint, you understand, are not evidence. That is simply what the plaintiff says it intends to prove and should not be considered by you as evidence at all in the trial, but I think it is well that we review, first, the allegations contained in the complaint, so that you may know just what the complaint charges that this defendant did.

This action was begun by the filing in this court by the plaintiff, Kiefer-Stewart Company, of a complaint in a single paragraph wherein the plaintiff charges that the defendants violated certain provisions of the federal anti-trust statutes to the damage of the plaintiff, and this action is brought by the plaintiff for the purpose of recovering from the defendants such alleged damages. In 518 brief the complaint alleges that the plaintiff is a wholesale drug company doing business in Indiana. One of the principal lines of business in which plaintiff is engaged is the purchase and sale, at wholesale, of whiskey. Two of the defendants are Joseph E. Seagram & Sons, Inc., and The Calvert Distilling Company, both of which are engaged in the distillation of whiskey. The other defendants are Seagram-Distillers Corporation and Calvert Distillers Corporation, which are wholly owned subsidiaries of the other two defendants, and are engaged in the sale of whiskey to wholesalers.

The complaint further charges that up until 1945 Seagram and Calvert were two of the largest distillers and distributors of blended whiskey in the United States and were in competition with each other. (Keep that date in mind because it may become important.) But that in 1945 Seagram acquired all of the common stock of Calvert and thus gained control of its principal competitor. It is further charged that during the war the wholesale prices 519 which plaintiff could charge for the sale of whiskey were fixed by the Government, but that after the war, when price controls were removed, the plaintiff decided

to increase its prices, and on November 1, 1946, it filed a new price schedule with the Alcoholic Beverage Commission of Indiana. That Seagram advised the plaintiff that Seagram's policy was against price raises and asked the plaintiff to lower its prices, which plaintiff refused to do.

That was the time, as you remember, when the dispute came up, on the question of the prices to be charged by the wholesale dealers in Indiana.

The complaint then alleges that Seagram and Calvert entered into a conspiracy to fix the wholesalers' prices and to cut off shipments of whiskey to wholesalers who would not abide by the prices fixed by Seagram and Calvert; that Seagram was able to induce Calvert to enter into this conspiracy by reason of the fact that Seagram owned the Calvert stock; that as a result of the conspiracy (I am saying this is what the complaint says) the defendants suspended all shipments of whiskey to Indiana wholesalers from November, 1946 to February, 1947, at which time most of the Indiana wholesalers, other than the plaintiff, agreed to charge the prices fixed by the defendants. That the plaintiff has refused to reduce its prices and the defendants have continued to refuse to ship whiskey to the plaintiff.

It may become important to you when you go to your jury room to consider the fact which is undisputed that since that time this defendant has not shipped a drop of whiskey to this plaintiff in Indiana, although it has shipped to others who fixed uniform prices.

The complaint alleges that Kiefer-Stewart had been a customer of Seagram and its subsidiaries since 1933; that Calvert had for several years prior to 1946 been attempting to get the plaintiff to handle Calvert's product; that early in November of 1946 plaintiff had agreed to handle the Calvert line and had placed orders for several months, but that, as a result of the alleged conspiracy, these orders, as well as the orders given to Seagram, beginning with November, 1946, were not filled.

As I recall it, Calvert has never shipped the plaintiff any whiskey. Isn't that right?

Mr. Daniels: That is correct, your Honor.

The Court: Subsequent to the filing of the original complaint in this action, the plaintiff has, by leave of court, filed a supplemental bill of complaint, wherein it is alleged that the defendants have continued to refuse to

supply whiskey to the plaintiff up to and including May 17, 1949, and that the plaintiff is entitled to recover the damages sustained by it during the period of time from November, 1946 up to and including May 17, 1949.

To this complaint the defendants have filed an answer denying that they entered into an illegal conspiracy to fix prices, and in a second paragraph of answer they allege that the Indiana wholesalers, including the plaintiff, unlawfully conspired to increase the wholesale price of whiskey; that in order to avoid participation in the wholesalers' conspiracy and in order to try to keep prices 522 down in accordance with the hold-the-line policy of the Government, the defendants discontinued shipments of whiskey to those wholesalers, including the plaintiff, and continued to refuse to supply any whiskey to any wholesalers whose prices were thus illegally established; and that, therefore, the defendants' actions were justifiable.

I might say at this time that it is no defense to this action, even though the plaintiff and the other wholesalers entered into a conspiracy among themselves, that would be no defense to this action, if the defendants entered into the conspiracy charged in the complaint.

Upon the issues joined, the burden is upon the plaintiff to prove all of the material allegations contained in the complaint by a preponderance of the evidence. While there have been but few witnesses in this case who have testified, yet the evidence has been very extensive and it is, therefore, well for the Court to explain to you at this time that the preponderance of the evidence is not always 523 determined by the number of witnesses who have testified to a fact or a given state of facts, nor necessarily by the length of the evidence, nor by the length of time that any one witness was on the witness stand and testified, but, by a preponderance of the evidence, as used in these instructions, is meant the greater weight of the evidence, and the evidence upon any question in issue that convinces you most strongly of its truthfulness may be said by you to be of the greater weight.

You, ladies and gentlemen, are the sole judges of the facts and of the credibility of the witnesses, or to any witness that was on the witness stand. It is for you to determine what the facts are. This Court cannot lay down any certain rule for you to follow in determining what

the facts are, or what weight and credit you will give to the testimony of any witness or witnesses.

You saw the witnesses as they appeared upon the witness stand. You had an opportunity to observe them. You, as business men and women, are frequently called upon to determine questions of fact in matters about which you do not have personal knowledge, and the
524 more experience you have had in your everyday life and association with people, the better you are enabled to weigh the evidence when you come into a court of justice as jurors, and determine what weight and credit you are going to give to the testimony of any particular witness and what the real facts are.

Now, of course, you will take into consideration the interest, if any, that a witness may have in the outcome of the trial. Then it is for you to say whether or not any interest that the witness may have would cause him or her to be biased or to testify to anything that was not the truth in order to get a verdict in the case. That is a question that will present itself to you in this case as it does in every case.

You should also consider the intelligence and the experience that people have—the opportunity they have had to ascertain the facts about which they testify, and such other facts as will assist you in determining what the facts are and the weight and credit that you are going
525 to give to the testimony of any particular witness or witnesses.

The complaint in this case is based on a section of the federal antitrust laws which says:

“Every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce among the several States . . . is hereby declared to be illegal.”

Another statute which I desire to call to your attention at this time provides:

“Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.”

526. The word "person" as used in this Act has been defined to include a corporation. You will notice that the Act uses the word "commerce," and the meaning of that word, as used therein, is defined to mean interstate commerce or commerce between two or more states, so far as its application to this case is concerned.

You will also note that the above section does not define the term "conspiracy" as used therein. However, for your information, I may say that the term, as used in such section, may be defined as being a confederation or agreement by and between two or more persons to accomplish by concerted action, an unlawful or oppressive object, or a lawful object by unlawful or oppressive means. The purpose of the law is to include in the prohibition whatever directly and substantially restricts interstate commerce.

Now that conspiracy, if you find a conspiracy existed, may have been formed at any time prior to the transportation of any goods which might have been shipped
527 in interstate commerce, and would be in violation of the antitrust act.

In order to establish a conspiracy it is not necessary that there should be an explicit or formal agreement between parties, nor is it essential that direct and positive proof be made of an express agreement to do the act forbidden. In cases under the antitrust statutes it may be often impossible to produce such proof because conspiracies are not usually meditated and planned in the presence of witnesses not parties thereto, nor in terms of express language. Hence, a conspiracy may be proved by circumstances. The combination or agreement between the parties to effect, by their concerted action, a restraint on interstate commerce must be proved by a fair preponderance of the evidence, but circumstantial evidence may be resorted to to show how such agreement or conspiracies are made and how they are carried out, how the parties charged with the conspiracy act, what they do, what they say, and all of those things, may be considered by you in determining whether or not a conspiracy did exist.

528 The first question, therefore, for you to determine is whether or not a contract or conspiracy did exist as alleged in the complaint, by and between the defendants—that is, two or more of the defendants, of course, the

others might not be guilty; if two or more of them entered into a conspiracy that is sufficient so far as those two are concerned—and if, upon consideration of that question you should determine that no such contract or conspiracy did exist, then, of course, your duties are ended and your verdict should be for the defendants.

It is the plaintiff's contention that there was a contract or a conspiracy between Seagram and Calvert to fix the resale prices of their products, and that such contract or conspiracy was illegal because it was a price-fixing agreement.

Under the law a contract or conspiracy to fix prices is illegal in itself. That is, such a contract is in restraint of trade and therefore detrimental to the public interest. If, therefore, you find from a preponderance of the evidence that such a contract or conspiracy was entered into by the defendants for the purpose of fixing the resale prices of their products, then you shall find that such contract was illegal within the meaning of this statute, and it will not be necessary for you to go any further into the reasons why it was illegal. That is, you need not consider why it was illegal, because it is illegal within itself. Where a group of producers enter into a contract to fix the resale prices of their products, that contract is illegal. The same is true if a group of wholesalers enter into a contract to fix the sale price. And it is not necessary for you to find any other elements of restraint of trade. You need not consider whether the prices so fixed were reasonable, nor whether the price-fixers controlled the market, or that some desirable ends were served. Combinations or conspiracies which fix prices constitute unreasonable restraints of trade whether for the purpose of raising, lowering, pegging or stabilizing the prices of goods sold in interstate commerce.

If you find that a contract or conspiracy existed between two or more of the defendants in violation of the antitrust law, then the fact that you also find that such defendants are in closely affiliated corporations rather than independent is immaterial. In other words, the corporate inter-relationships of the corporations does not immunize any unlawful agreement between them.

If you find that there was no such contract or conspiracy, then, of course, you shall find for the defendants. But if you find that a conspiracy as charged in the complaint

was entered into, then your duty is very simple in determining that there was such a conspiracy and then you pass on to the damages, if any, which the plaintiff sustained. I might say that so far as the damages are concerned, the damages which you are required to fix, if you find for the plaintiff, are the actual damages. While the statute provides for treble damages, or three times the actual damages, it is not your responsibility to determine the amount of the judgment. You are simply called upon to find what, if any, are the actual damages to the plaintiff, and then it becomes the duty of the Court to determine the amount of the judgment which includes the attorneys' fees, along with the question of whether other damages should be added to the actual damages.

In this connection you may consider only those damages, if any, which resulted and flowed from the wrongful acts of the defendant complained of, and which relate solely to the injury resulting to the plaintiff's business. Speculative or uncertain damages are not recoverable. Damages are not rendered speculative or uncertain, however, because they cannot be established with absolute exactness. It is sufficient if a reasonable basis for computation is afforded by the evidence, although the result may be approximate.

Damages for such injury, if you find the plaintiff was injured by the defendants, as alleged in the complaint, must be proved by facts from which their existence is logically and legally inferable and not by conjecture or surmise. Actual damages only may be recovered, and such actual damages as may be established not by conjecture or unwarranted estimates of witnesses, but by actual facts in evidence. The facts must be proved from data which form a rational basis for a reasonably correct estimate of the nature of the injury and the amount of damages that result therefrom if there are any such damages.

While the statute provides that the plaintiff may sue for "threefold the damages" which he has sustained and a reasonable attorney's fee, it is your duty to determine only the actual amount of the damages. If you find that there are actual damages, then it is the duty of the Court to fix the amount of the judgment as well as of the attorney's fees.

So I think I have explained the law sufficiently to you

and when you go into your jury room, elect one of your own members as foreman, and when you have arrived
533 at your verdict, have the foreman sign it, and report to the bailiff in whose charge you will be.

Anything else?

Mr. Daniels: Nothing from us, your Honor.

Mr. Paul Davis: I have some, your Honor. It is not the practice to make it in the presence of the jury?

The Court: All right, gentlemen, step out.

(The jury left the jury box.)

Mr. Davis: Shall I proceed, your Honor?

The Court: That is all right.

Mr. Davis: The defendants and each of them except to the refusal of the Court to give each of the instructions tendered in writing before the beginning of the argument numbered from 1 to 11, inclusive.

The defendants and each of them also except to that portion of the charge of the Court in which the jury is in substance instructed that even though the plaintiff is proved to have been a member of an illegal conspiracy,
534 to raise prices of wholesale liquor in Indiana, that such fact would constitute no defense to the action, and in that connection I refer to the requested instructions upon that subject.

The Court: Well, do you think they are, honestly?

Mr. Davis: Yes, I do, your Honor, very much so.

The Court: In what way? The fact that you do a wrong or I do a wrong, the wrong that you do is no defense to my wrong, is it?

Mr. Davis: No, but it is a defense to the damages, in my opinion.

The Court: What is your notion about that? I thought of that quite a while.

Mr. Daniels: That is our position, your Honor, of course, the one you have stated.

The Court: I say even the fact that these local wholesalers may have entered into a conspiracy to raise the wholesale price, how would that affect the defendants in any way?

535 Mr. Davis: In two ways, your Honor. In the first place, the defendants ran a considerable risk of being charged to be members of that conspiracy.

The Court: There is no evidence they were members. The fact is that the evidence all is—

Mr. Davis: (Interposing.) They refused to be, by so refusing they are sued. In the second place—

The Court: (Interposing.) I would not say that, but they refused to be, and there is no evidence, not a syllable of evidence, as I remember it, that they were parties.

Mr. Davis: But that refusal is what they are charged with having caused damage with.

The Court: Oh, no, what they are charged with is that they entered into conspiracy themselves, not with these wholesalers. Isn't that right?

Mr. Daniels: That is right.

Mr. Davis: The other reason why I think that that is a good defense is that that conspiracy was directed at and injurious to the defendants, them among others, and 536 they had a right to defend themselves against the result of that conspiracy by refusing to deal with the conspirators. That is what they are charged with having done to the plaintiff's damage.

The Court: No, no. They dealt with some of them. This plaintiff is about the only one, as I recall it, they didn't.

Mr. Daniels: They didn't finally deal with.

The Court: They did deal with the others, didn't they?

Mr. Davis: Yes.

The Court: That is what I think.

Mr. Davis: I can't quite see that that alters the situation. They are liable for what they did in November if at all, and not in February.

The Court: I am trying to think out loud. That is the way I reason it out.

Mr. Davis: I merely want to make my record, your Honor. I don't want to impugn the Court's instructions.

537 The defendants, and each of them except to that portion of the Court's instructions in which they are authorized to find the defendants liable in damages if the jury finds that a conspiracy existed as was alleged in the complaint, for the reason that the defendants do not believe that the complaint alleges that an unlawful conspiracy, that is really an attack upon the complaint, but also the instruction carries out the same error.

The Court: I think, however, we told them if there was a conspiracy between the defendants.

Mr. Daniels: That is right.

The Court: As I remember it.

Mr. Davis: The defendants and each of them also object to and except to that portion of the Court's instruction in which the jury was charged that any conspiracy to fix prices is illegal. The defendants have set out their view upon that question of law, in their requested instruction No. 2, which the defendants submit is the correct interpretation of the law.

538 The Court: You don't deny, then, do you, that they have a right to enter into a conspiracy to fix prices?

Mr. Davis: That is not the exception, your Honor. The exception is to the charge that a conspiracy to fix and coerce, if you please, a maximum resale price is per se illegal. We believe that no case so holds.

The Court: I didn't use the word maximum. I said to fix prices.

Mr. Davis: I know, and my point, your Honor, is exactly that, that a conspiracy to fix a maximum price is not per se illegal.

The defendants and each of them also except to that portion of the Court's instruction in which it is stated that the close affiliation of the defendant corporations is an immaterial matter in determining whether or not a conspiracy existed, it being the position of the defendants that the jury should have been instructed that they might consider whether or not the joint action of the
539 defendants was a result of a conspiracy between them, or the result of their common control and operation.

The Court: Well, personally I can't see how you can except to that because I gave you the best of every part of it. The fact that they are closely related is no evidence of there being a joint conspiracy.

Mr. Davis: The defendants also except to that portion of the Court's instruction in which he told the jury that they might award damages resulting from an injury from the wrongful acts complained of, without limiting that to any wrongful acts actually shown to have been done by the evidence.

The Court: Well, I will tell them that, if you want me to.

Mr. Davis: Beg pardon?

The Court: I will tell them that. I thought they understood the acts complained of were the ones in the complaint. I can tell them that what I meant by that, any wrongful acts as shown by the evidence.

Mr. Daniels: I don't recall how the instruction
540 read, but that was certainly your Honor's intention.

The Court: I will tell them that.

Mr. Daniels: I think perhaps, your Honor, on that subject, you left the impression—it has no bearing—that Kiefer-Stewart did not come down in February in its prices. It did come down—

The Court: (Interposing.) I didn't say anything about it.

Mr. Daniels: I wasn't sure whether I heard you correctly or not.

Mr. Davis: Those are all.

The Court: Bring the jury in, please.

(The jury returned to the jury box.)

The Court: Now, Ladies and Gentlemen, if I stated in my first instructions that if you found for the plaintiff, you should award such damages as those you may find are complained of, I meant by that, and I mean to say now, that if you find for the plaintiff, you shall award it such damages as you find that it is entitled to under all of
541 the evidence in this case, if you find it is entitled to any damages.

Any objection to that, Mr. Davis?

Mr. Davis: The precise point was, your Honor, that the jury might have been led to believe that the acts stated in the complaint were all proved.

The Court: No, I didn't mean that. If you got that impression, strike it clear out of your minds. I meant that if you find for the plaintiff, then it is your duty to assess the damages; and those damages are such damages that the plaintiff sustained, if you find that it sustained any actual damages from the wrongful acts of which complaint is made and upon which the evidence bears.

Mr. Davis: I think that covers it, your Honor.

The Court: Any others, Mr. Davis?

Mr. Davis: That is all, your Honor.

The Court: Anything, Mr. Daniels?

Mr. Daniels: No.

542 The Court: I am going to ask the Marshal to take you, if you care to, some place to get a lunch before you begin considering the case. I am sorry but under the rules now, I believe there is no way that the Government can pay for the lunch.

The Marshal: That is right. It is to their advantage to pay it, Judge.

The Court: Use your own pleasure. If you want to consider your verdict now, I will be here all the time. We can call the defendants and plaintiffs in. If you want to go and get your lunch first, before you consider the case, go ahead and the Marshal will tell you what the rules are on payment for that lunch.

Is there anything else?

Mr. Davis: Nothing that I know of.

Mr. Daniels: Nothing, your Honor.

The Court: Let's adjourn until two o'clock. If you are not back at that time we will wait for you.

Whereupon The Court Was Adjourned Until Two O'clock.

543

4:10 o'clock.

Further instructions to the Jury.

The Court: Ladies and Gentlemen, I understand you haven't arrived at a verdict?

The Foreman: That is correct.

The Court: What is the trouble? Is it a question of law or a question of fact?

The Foreman: A question of fact.

The Court: If it is, you have to decide it.

The Foreman: Can we have further instructions as to—

The Court: (Interposing.) On what?

The Foreman: As to what we are to find.

The Court: I can't tell you what you are to decide.

The Foreman: On what we are to decide between, whether it is guilty or not guilty or—

The Court: (Interposing.) You are to decide whether or not the defendants violated the antitrust law as I explained that law to you. That is the question, first, 544 and then the second question, if you find that they did, then the question of damages. If you find they didn't, why, your duties are over. I don't know how I can explain it any plainer than what I did.

Did you have any particular question in mind?

The Foreman: That answers my question.

The Court: Anyone else? It is a question, first, as I explained to you and read to you the law, of the antitrust law. That is the basis of this action. If you should find

that the defendants didn't violate that law, then, of course, your finding is for the defendants. If you find the defendants did violate it, then your obligation is to fix the amount, if any, of damages that the plaintiff sustained because of that violation. Does that answer the question, do you think, or not? I want to help you all I can, but I am not going to stay here but just a little while.

Juror No. 4: Your Honor, may I ask that refusing
545 to sell liquor in the State of Indiana—is that a violation of the anti-trust law?

The Court: Well, I think I explained that to you, that that within itself isn't a violation, of course, just refusal to sell. This is the law upon which the complaint is based. It says: "Every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce among the several states * * * is hereby declared to be illegal."

That constitutes an illegality if they form that sort of a conspiracy, and the other statute I read to you is:

"Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to
546 the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

As I told you before, if you find for the plaintiff, you are only to find actual damages that it has sustained, and then it becomes the duty of the Court to fix attorney's fees, and the question of the amount of the damages over and above the actual damages, if there are any:

Does that answer your question?

Juror No. 3: Your Honor, is a verbal contract as binding as a written?

The Court: A verbal contract is as binding. If it is made in good faith between the parties, it doesn't have to be in writing.

Is there any other question?

Mr. Paul Y. Davis: If the Court please, I might suggest there is no binding verbal contract alleged or proved in this case.

The Court: Well, that is a question for them to determine. I don't think they contend there was any writ-
547 ten contract.

Mr. Davis: Well, there is no suit for a breach of any contract either.

The Court: Well, it is a suit for the violation of the antitrust law. I tried to explain that to them. It isn't a question of a suit on a breach of contract, but it is a question of whether or not the defendants violated the antitrust laws as we explained them to you in our instructions, and if so, the amount of damages that the plaintiff has suffered.

Is there anything else now that you want?

Juror No. 5: Isn't it true when two or more parties get together, that that is a violation? Isn't that the antitrust act?

The Court: Well, it depends on what they do. If they conspire together for the purpose of violating the antitrust act, why, it, of course, is a conspiracy then, and in violation of that act. If they conspire together to do the things that the law says they can't do, I explained that fully, I think. I don't have my instructions all 548 in writing or I would read them to you. I gave part in writing and part—

Is there any other question?

It is a question of whether or not the defendants in its dealings with the plaintiff, violated the Sherman Antitrust law. That is the question, and if it did, then the amount of the damages, if the plaintiff suffered any damages, I don't expect to stay here more than fifteen or twenty minutes. If you have arrived at a verdict by that time, I will be here to receive it; otherwise, I am going to tell you now so I won't have to call you back, that you will be in charge of the bailiff, and if you don't arrive at your verdict by that time, and arrive at it later in the night, you have a right then to be separated. The foreman signs the verdict, keeping it in his control and reporting it to no one, and you report back to this Court in the morning at ten o'clock.

Juror No. 3: Will we be allowed to go home or do we need to be here to report? I live in the southern 549 part of the State.

The Court: If you arrive at your verdict tonight after I have gone, then you can separate. I don't care where you go.

Juror No. 3: Will we need to report?

The Court: Absolutely, in the morning at ten o'clock, but your verdict should be signed by the foreman and

left with the foreman and then you can separate and go to your respective places, and be back in the morning at ten o'clock.

Is there anything else you think of, Mr. Daniels?

Mr. Daniels: No, your Honor.

The Court: Any further suggestions?

Mr. Paul Y. Davis: No, your Honor.

The Court: Anything else any of you had? I have tried to make it plain. I will be here until a quarter to five. If you haven't arrived at your verdict by that time, I won't be here any more this evening, and when you arrive at your verdict later in the night, return in
550 the morning with the sealed verdict. The clerk will furnish you an envelope. Sign it by the foreman, seal it and leave it in the hands of the foreman and be back in the morning at ten o'clock.

Whereupon The Court Adjourned At Four-Twenty O'clock P.M.

551

Indianapolis, Indiana,
May 24, 1949,
10:00 o'clock a. m.

The Court: Ladies and Gentlemen, it isn't my province to tell a jury what to do. I don't propose to do it, but you have been out now a long time. I am not thinking of discharging you. I want you to go back to your room, quit looking out that window, and think about this case. It costs money to try lawsuits. It costs money for the plaintiff, it costs money for the defendants, it takes the time of the Court, takes your time, and if, without giving up any of your convictions, you can decide the case, it is your duty to do it.

Now, go back to your jury room, and think about this case.

Do you have any question to ask?

The Foreman: Your Honor, is it possible for the jury to hear any part of the evidence or the interrogatories that were given to the defendants?

The Court: We never have submitted any inter-
552 rogatories to a jury that I remember.

The Foreman: They were read.

The Court: I don't think it would be proper to submit them to the jury at this time.

Mr. Daniels: Could they be reread?

The Court: I don't know why it would be necessary to do it.

Mr. Davis: If the Court please, I don't think it is proper to read a portion of the evidence without reading the entire thing.

The Court: I don't think it would be proper to do it, and I don't think that it would be proper to submit them to the jury, that is, let them take them to the jury room. I remember having done that once in Chicago, and they got exhibits there that were refused to be admitted in evidence. I don't think it is proper to do that.

Do you have any other question?

The Foreman: We have made a very rugged attempt—

The Court: (Interposing.) You haven't begun, as 553 far as time is concerned. We are not thinking of excusing you, so if you have no other question bearing upon the issues that I could help you in, why, I will ask you to return to your jury room. But keep in mind that a lawsuit costs money. That is no reason for you to give up any conviction, if it is based solely upon the evidence, and that is what I want you to think about.

Do you have anything else?

The Foreman: That is all I have in mind.

Juror No. 4: Your Honor, this evidence that our foreman was asking about, or this document, it is a question of whether it was understood properly or not.

The Court: Well, just questions and answers.

Juror No. 4: It is one particular item that I think he has the number of it.

The Foreman: No, it is in—

The Court: (Interposing.) I don't remember who took those, the plaintiff?

554 Mr. Daniels: We propounded the interrogatories to the defendants, and we read them to the jury with the answers that they made under oath to the interrogatories.

The Court: All of them were read?

Mr. Daniels: Not all.

The Foreman: This is the one where Mr. Friel made his sworn statement.

The Court: I doubt whether it would be proper to read a part of the evidence unless we read it all.

Mr. Daniels: We are perfectly willing to have it done, if it could be done.

Mr. Davis: I should think it might cause undue emphasis upon a portion of the evidence.

The Court: Well, I am afraid so.

I would be glad to help you in any way I can. You know that, but we could not read the interrogatories. That would be emphasizing, perhaps, too much one part of the evidence, without the other.

So you go back to your jury room. As I say, the 555 temptation is to go over and put your feet in the window and look out the window instead of talking and thinking about the case. Don't do that. Let's work on this case, because I have no notion of excusing you at all at this time because you haven't considered the case long enough, if that is what you had in mind.

Anyone else have anything?

Juror No. 9: Is it customary for the minority to go in with the majority in deciding?

The Court: You have to agree unanimously on a verdict. Does that answer your question?

Juror No. 9: Yes, sir.

The Court: Yes, there has to be unanimous agreement on the verdict so far as the verdict is concerned, but as I say, you should discuss it between and among yourselves. If there are differences, you have a perfect right to discuss those differences with one another, and if you can agree finally in your own mind upon something that will be unanimous, why, of course, you can do it, 556 as I say, I am saying that without any criticism at all, but it is expensive to try jury law cases as it is in other cases, and we don't want to try cases any more often than we have to.

The Foreman: Your Honor, we felt very much like if we could hear this statement reread it might clarify the minds of some of the members of the jury, and we were so in hopes that that might be done.

It seems that around these particular—

The Court: (Interposing.) I have no idea what the question is.

The Foreman: It seems around these particular statements, our difficulty seems to hinge.

The Court: Suppose you go back to the jury room and we can let the lawyers talk it over and see. I don't know what those statements are.

Mr. Daniels: We would be glad to have them read. I think I do know what they are.

(The jury returned to their jury room.)

557

12:35 P. M.

The Court: This is the case of the Kiefer-Stewart Company against Seagram.

Have you arrived at a verdict, Ladies and Gentlemen?

The Foreman: Yes, your Honor, we have a verdict.

(The verdict was passed to the Clerk, who read it, as follows:

We, the jury, find for the plaintiff, and assess its damages at \$325,000.

Harold S. Spencer, Foreman.)

The Court: Is this the verdict, Ladies and Gentlemen, of each and every one of you?

The Foreman: It is.

Mr. Davis: Your Honor, in view of the time that it took to arrive at that verdict, I move that the jury be polled.

(The jury was polled, and each said it was his verdict.)

558 The Court: Is that all at this time?

Mr. Davis: Yes, sir.

The Court: We can enter up a judgment later on in the case, take whatever steps are necessary. Is that all right?

Mr. Daniels: Yes, sir.

The Court: As I understand the verdict was for the plaintiff in the sum of \$325,000?

The Foreman: That is right.

The Court: All right, I am going to excuse you now at this time and permit you to go to your homes. I think this will be the last case we will need the jury for.

Whereupon the Court was adjourned at Twelve-Forty P. M.

PLAINTIFF'S EXHIBIT NO. 1.

IN THE DISTRICT COURT OF THE UNITED STATES.

• • (Caption—1524) • •

STIPULATION.

(Filed Aug. 26, 1949. Albert C. Sogemeier, Clerk.)

It is hereby agreed by and between plaintiff, Kiefer-Stewart Company, and defendants Joseph E. Seagram & Sons, Inc., Seagram-Distillers Corporation, The Calvert Distilling Co. and Calvert Distillers Corporation, that this Stipulation, or any part thereof, when introduced in evidence, shall have the same force and effect as though the matters therein stated had been proven by competent evidence on the trial of said cause.

1. Plaintiff, Kiefer-Stewart Company (hereinafter referred to as "Kiefer-Stewart") is a corporation organized and existing under and by virtue of the laws of the State of Indiana, with its principal office and place of business in the City of Indianapolis, Marion County, Indiana, and is a citizen and resident of the Southern District of Indiana.

2. Defendant Joseph E. Seagram & Sons, Inc. (hereinafter referred to as "Seagram (Indiana)") is a corporation organized and existing under the laws of the State of Indiana, with its principal executive offices in the City
48 of New York, New York, which is engaged in the distillation, rectification and sale of whiskey and other liquors.

3. Defendant Seagram-Distillers Corporation (hereinafter referred to as "Seagram (Sales)") is a corporation organized and existing under the laws of the State of Delaware, and is a wholly-owned sales subsidiary of said Joseph E. Seagram & Sons, Inc., engaged in the sale of whiskey and other liquors.

4. Defendant The Calvert Distilling Co. (hereinafter referred to as "Calvert") is a corporation organized and existing under the laws of the State of Maryland, with its principal office in New York, New York, which is also engaged in the distillation, rectification and sale of whiskey and other liquors.

5. Defendant Calvert Distillers Corporation (hereinafter referred to as "Calvert (Sales)"), a wholly-owned sales subsidiary of defendant The Calvert Distilling Co., is a Maryland corporation which is engaged in the sale of whiskey and other liquors.

6. At all times mentioned in the complaint the defendants Seagram (Indiana), Seagram (Sales), Calvert and Calvert (Sales) have engaged in trade and commerce in the sale and distribution of whiskey and other liquors in certain of the States of the United States of America and that Seagram (Indiana) and Calvert (Sales) have transacted business in the Southern District of Indiana.

7. Defendant Joseph E. Seagram & Sons, Inc. (Seagram (Indiana)) was organized on October 23, 1933, under the laws of the State of Indiana as a wholly-owned subsidiary of Distillers Corporation-Seagram, Ltd., of Montreal, Canada, a Canadian corporation (sometimes hereinafter referred to as "Distillers-Seagram"). In December 1933, said defendant Seagram (Indiana) acquired

distilleries at Lawrenceburg, Indiana, and from the date of such acquisition until the date hereof said defendant Seagram (Indiana) has engaged in the operation of said distilleries at Lawrenceburg, Indiana, and of other distilleries from time to time built or acquired by it in various states of the United States. That at all times referred to in the plaintiff's complaint herein, defendants Seagram (Indiana) and Seagram (Sales) have sold whiskies and other liquors distilled or rectified by Seagram (Indiana), in certain states of the United States; that at all such times defendant Seagram (Indiana) has sold whiskies and other liquors distilled or rectified by it in the State of Indiana; and that at all such times Seagram (Sales) has imported whiskey in case lots from the Dominion of Canada into Indiana for reshipment to other states or for sale and delivery, in its original packages, in the State of Indiana.

8. Distillers-Seagram was organized under the laws of Canada on March 2, 1928. Seagram's line of whiskies includes, among others, Seagram's V-O, a Canadian import, Seagram's 7-Crown, Seagram's 5-Crown and Kessler, said brands being the principal Seagram brands sold in the State of Indiana.

9. Whiskies in general are classified as "straight whiskies," "blended whiskies" and "spirit blends." "Straight whiskies" are those which have been aged for at least two

years and are at least 80 proof (or 40% of alcohol by volume). "Bottled in bond" whiskies are straight whiskies which are aged for at least four years, are 100 proof and are bottled and warehoused under Federal regulations by which payment of the excise tax is deferred until such whiskies are put in consumption channels. "Blended whiskies" are a blend of two or more straight whiskies. "Spirit blend" whiskies consist of a blend of straight whiskey, which under Federal regulations must constitute at least 20% by volume thereof, with "neutral spirits" distilled either from grain or other alcohol-producing raw material, as to which spirits there is no aging requirement.

10. On October 8, 1942, as a result of World War II and of the extraordinary need for grain supplies in the prosecution of the war, the distillation of grain into whiskey was ordered discontinued by the Government of the United States and except for one month holidays in the months of August, 1944, and January and July, 1945, no whiskies were permitted to be distilled from grain from said date of October 8, 1942, until November, 1945. Continued but modified restrictions upon grain use for beverage spirits were thereafter continued through the year 1946, due to world demands for food and feed. As a result, all whiskey distillers, including those who had been largely straight whiskey producers, were required to stretch their inventories of straight whiskies on hand in 1942 over the period of the war, and until distillation restrictions were removed and until further stocks of whiskey could be distilled and aged.

11. Shortly after the distillation of whiskey from grains was so ordered discontinued on October 8, 1942, the defendants adopted an allocation system for the distribution of their supplies of whiskies.

12. Calvert (Sales) continued its allocation system until March 1947, and Seagram (Sales) has continued its allocation system to the date of the filing of the complaint herein.

13. Plaintiff is and at all times alleged in the complaint was a wholesale drug company, one of whose principal lines of business is the purchase, both within and outside of the State of Indiana, of high grade whiskey and other liquors, and the sale thereof, at wholesale, in the State of Indiana. Seagram (Indiana) sold plaintiff an average of 1,385 cases of whiskey per month in 1940,

3,464 cases per month in 1941 and 4,212 cases per month in 1942. Julius Kessler Distilling Co., Inc. is an Indiana corporation which, from time to time, leased the Lawrenceburg Distilleries of Seagram (Indiana) for the manufacture of whiskies sold under the Kessler name.

14. Plaintiff began handling the Seagram line shortly after the repeal of prohibition in 1933, and until November 1946, plaintiff was one of the largest distributors of Seagram whiskies in Indiana.

15. Defendant Calvert Distilling Company was organized under the laws of Maryland in 1933. Said corporation operates distilleries, rectifying plants and warehouses in the States of Kentucky and Maryland and maintains executive offices in Louisville, Kentucky, and New York, New York. Soon after its organization it acquired the "Calvert" trademark. Early in 1934, Distillers-Seagram acquired full stock control of the Calvert Distilling Company. Calvert thereafter greatly expanded its operations until, in 1942, Calvert and Seagram (Indiana) were the largest distillers and distributors of spirit blend whiskies in the United States. Calvert's principal brands under which its whiskies are sold are Lord Calvert, Calvert Reserve and Calvert Special.

16. Between the period from 1934 to April 1945, both Seagram (Indiana) and Calvert were subsidiaries of Distillers-Seagram (the Canadian corporation). Calvert's products during said period were, and are, largely sold through its sales subsidiary, defendant Calvert (Sales), and Seagram (Indiana's) products were and are largely sold through its sales subsidiary, Seagram (Sales).

17. For many years prior to April 9, 1945, Seagram (Indiana) and Calvert were the largest operating subsidiaries in the United States of Distillers-Seagram, the Canadian corporation. Both of said defendants operated numerous distilleries, rectifying plants and warehouses. From the years 1939 to 1942, said defendants paid to Distillers-Seagram, the Canadian corporation, in the form of dividends on their capital stock the following amounts:

	1942	1941	1940	1939
Seagram (Indiana) \$	900,000	920,680	1,108,000	936,000
Calvert	1,200,000	914,241	2,500,000	1,250,000

18. On April 9, 1945, Seagram (Indiana) acquired from Distillers-Seagram, the Canadian corporation, all of the

common stock and other outstanding securities of The Calvert Distilling Co. Calvert, at the time, had outstanding in addition to its common stock, \$6,550,000 of its 6% debentures due November 11, 1946, and 33,000 shares, having a par value of \$100 per share of its non-cumulative 6% preferred stock (or a total par value of \$3,300,000). Seagram (Indiana) in exchange therefor issued to Distillers-Seagram 98,500 shares of its 6% non-cumulative preferred stock, having a par value of \$100 per share (or a total par value of \$9,850,000). In addition, Seagram (Indiana) issued to Distillers-Seagram 1,250 shares of its common stock in exchange for all of the outstanding shares of common stock of defendant The Calvert Distilling Co., Distillers Warehouses, Inc., and Seagram, Inc. (Kentucky), then owned by Distillers Seagram, the Canadian corporation. As a result of said acquisition, Seagram (Indiana) acquired stock control of all of the United States subsidiaries of Distillers-Seagram, including The Calvert Distilling Co.

19. Soon after the repeal of prohibition laws, defendant Seagram (Indiana) obtained the marketing facilities of approximately twelve of the largest wholesale distributors in the State of Indiana, including plaintiff.

20. On August 11, 1943, the Office of Price Administration promulgated Maximum Price Regulation 445, under which wholesalers, including plaintiff, were permitted a mark-up on whiskies of 15% over cost, but were not permitted to include as an item of cost in determining their mark-up any increase in taxes which might be imposed by the Federal or State governments after November 2, 1942. Subsequent to the adoption of Maximum Price Regulation 445, an additional Federal tax of \$3 per proof gallon was added to the wholesalers' costs of whisky on April 1, 1944, and an Indiana tax of \$1 per wine gallon was added on May 1, 1945. Inasmuch as such taxes were not permitted to be taken into account in fixing the 15% mark-up, it resulted that the gross profit allowed wholesalers, including plaintiff, amounted to approximately 10% on the selling price of such products.

21. On October 23, 1946, government regulation of liquor prices, under the Office of Price Administration was terminated.

22. Plaintiff, after receipt of advice from Calvert (Sales) of an initial allocation of 2,000 cases of whiskey for the month of November, 1946, and of a further allocation

tion of 2,000 cases of whiskey for the month of December, sent to Calvert (Sales) on or about November 13, 1946, and said Calvert (Sales) thereafter received, Indiana revenue stamps covering such two allotments. Plaintiff further supplied to Calvert (Sales) Indiana revenue stamps to cover 2,000 cases of whiskey for the months of January and February, 1947. None of said monthly allocations or orders of whiskey were delivered to plaintiff.

23. On or about October 17, 1946, Seagram (Sales) notified plaintiff in writing from the Seagram (Sales) executive offices in New York, N. Y., that there had been allocated plaintiff, 2,106 cases of Seagram whiskeys for the month of November, 1946, and at said defendant's request plaintiff, on or about October 28, 1946, delivered to defendant Seagram (Indiana) state revenue stamps covering such 2,106 cases, which cases were never delivered to plaintiff.

24. Calvert (Sales) and Seagram (Sales) suspended all shipments of their whiskeys to plaintiff and their other Indiana wholesalers from and after November 1946 to February 3, 1947.

Baker & Daniels,
By Joseph J. Daniels,
William G. Davis,
Attorneys for Plaintiff.

Davis, Baltzell, Hartsock & Dongus,
By Gustav W. Dongus,
Attorneys for Defendants.

55 PLAINTIFF'S EXHIBIT NO. 2.

IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—1524) * *

STIPULATION RE CERTAIN EXHIBITS ON FILE
AT THE INDIANA ALCOHOLIC BEVERAGE COM-
MISSION.

Kiefer-Stewart Company, plaintiff, and Joseph E. Seagram & Sons, Inc., Seagram-Distillers Corporation, The Calvert Distilling Co. and Calvert Distillers Corporation, hereby stipulate and agree that the following exhibits are on file in the office of The Indiana Alcoholic Beverage

Commission and may be offered in evidence without proof of their authenticity, reserving, however, to the defendants the right to object to the introduction in evidence of said exhibits upon any other grounds, viz.:

1. Contract under The Indiana Fair Trade Act between Joseph E. Seagram & Sons, Inc. and Fred A. Beck Co., Inc., dated July 14, 1947. (Exhibit No. 3.)

2. Contract under The Indiana Fair Trade Act between Calvert Distillers Corporation and Gary Wine and Liquor Corp., dated July 24, 1947. (Exhibit No. 4.)

56 3. Price postings under The Indiana Fair Trade Act of Joseph E. Seagram & Sons, Inc., bearing file mark of April 18, 1947. (Exhibit No. 5.)

4. Price postings under The Indiana Fair Trade Act of Joseph E. Seagram & Sons, Inc., dated July 20, 1947. (Exhibit No. 6.)

5. Price postings under The Indiana Fair Trade Act of Calvert Distillers Corporation, bearing file mark of November 5, 1948. (Exhibit No. 7.)

6. List of authorized distributors in Indiana of Seagram Distillers Corporation, dated October 30, 1946, received November 1, 1946. (Exhibit No. 8.)

7. List of authorized distributors in Indiana of Joseph E. Seagram & Sons, Inc., dated July 22, 1947, received July 23, 1947. (Exhibit No. 9.)

8. List of authorized distributors in Indiana of Calvert Distillers Corporation, dated November 13, 1946, received November 16, 1946. (Exhibit No. 10.)

The parties further stipulated subject to objection as to relevancy and competency that Seagram-Distillers Corporation and Calvert Distillers Corporation fair trade contracts, referred to as Items 1 and 2 above, are typical of contracts under The Indiana Fair Trade Act which were effective on or about the above-mentioned dates between Seagram-Distillers Corporation and all of its Indiana wholesalers and Calvert Distillers Corporation and all of its Indiana wholesalers.

Baker & Daniels,

By Joseph J. Daniels,

William G. Davis,

Attorneys for Plaintiff,

Davis, Baltzell, Hartsock & Dongus,

By Paul Y. Davis,

Attorneys for Defendants.

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PLAINTIFF'S EXHIBIT NO. 3.

Wholesalers' Fair Trade Agreement

Indiana Alcoholic Beverage Commission

Agreement made between Jos. E. Seagram & Sons, Inc., hereinafter called the "Producer" and Fred A. Beck Company, Inc., hereinafter called the "Wholesaler."

Whereas, the Producer has filed with the Indiana Alcoholic Beverage Commission a minimum resale price schedule for certain alcoholic beverages, a copy of which is attached hereto, marked Exhibit A, and made a part of this Agreement; and

Whereas, the parties hereto desire to avail themselves of the benefits of the Indiana Fair Trade Act and Regulation No. 11 of the Indiana Alcoholic Beverage Commission

Now Therefore, in consideration of the promises hereinafter contained, it is agreed as follows:

1. The Wholesaler agrees not to resell, advertise, or offer for sale, except as provided in Regulation No. 11, any alcoholic beverages described in Exhibit A which he has purchased, now has on hand, or may hereafter purchase or acquire, below the minimum resale prices stipulated and filed by the producer.

2. The Wholesaler agrees not to resell any alcoholic beverages described in Exhibit A to any dealer until said dealer agrees that he will not, in turn, resell at less than the minimum resale prices stipulated and filed by the producer.

3. The Producer agrees not to sell any of the alcoholic beverages described in Exhibit A to any Indiana wholesaler unless such wholesaler will agree in writing not to sell the same to any retailer unless the retailer will in turn agree not to resell the same except to consumers for use and at not less than the stipulated minimum resale prices filed; and such wholesaler will likewise agree in writing not to resell the alcoholic beverages described in Exhibit A to any other wholesaler or retailer to whom he may resell.

4. The Producer agrees not to sell any of the alcoholic beverages described by Exhibit A to any Indiana retailer, unless the retailer will agree in writing not to resell the

same except to consumers for use and at not less than the stipulated resale prices filed by the producer.

5. It is agreed that in case of a breach of this agreement by either party, the injured party shall receive from the other party, as liquidated damages for each violation of this agreement, the sum of \$50.00, and a reasonable attorney's fee.

6. It is agreed between the parties that all provisions of Indiana Alcoholic Beverage Commission Regulation No. 11 and the Indiana Fair Trade Act are a part of this Agreement and shall apply hereto.

Executed this 14th day of July, A. D. 1947.

Producer:

Wm. W. Behrman.

Wholesaler:

Fred A. Beck Company, Inc.,

By F. A. Beck,

Vice President.

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PLAINTIFF'S EXHIBIT NO. 4.

Indiana Alcoholic Beverage Commission

Wholesalers' Fair Trade Agreement

Agreement made between Calvert Distillers Corporation, hereinafter called the "Producer" and Gary Wine & Liquor Co., hereinafter called the "Wholesaler."

Whereas, the Producer has filed with the Indiana Alcoholic Beverage Commission a minimum resale price schedule for certain alcoholic beverages, a copy of which is attached hereto, marked Exhibit A, and made a part of this Agreement; and

Whereas, the parties hereto desire to avail themselves of the benefits of the Indiana Fair Trade Act and Regulation No. 11 of the Indiana Alcoholic Beverage Commission

Now Therefore, in consideration of the promises hereinafter contained, it is agreed as follows:

1. The Wholesaler agrees not to resell, advertise, or offer for sale, except as provided in Regulation No. 11, any alcoholic beverages described in Exhibit A which he has purchased, now has on hand, or may hereafter purchase or acquire, below the minimum resale prices stipulated and filed by the producer.

2. The Wholesaler agrees not to resell any alcoholic beverages described in Exhibit A to any dealer until said dealer agrees that he will not, in turn, resell at less than the minimum resale prices stipulated and filed by the producer.

3. The Producer agrees not to sell any of the alcoholic beverages described in Exhibit A to any Indiana wholesaler unless such wholesaler will agree in writing not to sell the same to any retailer unless the retailer will in turn agree not to resell the same except to consumers for use and at not less than the stipulated minimum resale prices filed; and such wholesaler will likewise agree in writing not to resell the alcoholic beverages described in Exhibit A to any other wholesaler unless such other wholesaler will make the same agreement with any wholesaler or retailer to whom he may resell.

4. The Producer agrees not to sell any of the alcoholic beverages described by Exhibit A to any Indiana retailer, unless the retailer will agree in writing not to resell the same except to consumers for use and at not less than the stipulated resale prices filed by the producer.

5. It is agreed that in case of a breach of this agreement by either party, the injured party shall receive from the other party, as liquidated damages for each violation of this agreement, the sum of \$50.00, and a reasonable attorney's fee.

6. It is agreed between the parties that all provisions of Indiana Alcoholic Beverage Commission Regulation No. 11 and the Indiana Fair Trade Act are a part of this Agreement and shall apply hereto.

Executed this 24 day of July, A. D. 1947.

Producer:

Calvert Dist. Corp.,
By Thos. E. Tarpey.

Wholesaler:

Gary Wine & Liquor Corp.,
Leon H. Rambler, Sec.

PLAINTIFF'S EXHIBIT NO. 5.

PRICE POSTINGS (PRODUCERS)

Under Contracts Subject to
INDIANA FAIR TRADE ACT
(Act of 1937, Chapter 17)

DISTILLED SPIRITS

Jos. E. Seagram & Sons, Inc.
426 Chamber of Commerce Bldg.
Indianapolis, Indiana

(Stamp) Received Apr 18 1947. Auditing Department
Date Filed
Effective Date 4/23/47

Brand and Description	Proof	Size	F.O.B. Distillery Including Federal Tax	Freight	Gallonage	State Tax Enforcement	Suggested Cost to Wholesaler	Retailer	Suggested Cost Bottle Price to Consumer
KESSLER'S PRIVATE BLEND		Quarts							
Blended Whiskey 85 proof—straight	85	Fifths	25.62	.35	4.80	.20	30.97	34.34	3.68
whiskies in this product are 3	85	Pints	32.24	.35	6.00	.24	38.83	43.06	2.55
years or more old. 25% straight		1/10 Gals.							
whiskey—75% Grain Neutral Spirits	85	1/2 Pints	32.90	.35	6.00	.24	39.58	43.92	1.15
SEAGRAM'S 5 CROWN		Quarts							
Blended Whiskey 86.8 proof—straight	86.8	Fifths	26.68	.35	4.80	.20	32.03	35.54	3.71
whiskies in this product are 5	86.8	Pints	33.68	.35	6.00	.24	40.27	44.69	2.17
years or more old. 27 1/2% straight		1/10 Gals.							
whiskey—72 1/2% Grain Neutral Spirits	86.8	1/2 Pints	34.43	.35	6.00	.24	41.02	45.55	1.17
SEAGRAM'S 7 CROWN		Quarts							
Blended Whiskey 86.8 proof—straight	86.8	Fifths	30.08	.35	4.80	.20	35.43	39.45	4.14
whiskies in this product are 5	86.8	Pints	37.93	.35	6.00	.24	44.52	49.58	2.17
years or more old. 35% straight		1/10 Gals.							
whiskey—65% Grain Neutral Spirits	86.8	1/2 Pints	38.68	.35	6.00	.24	45.27	50.44	1.32
SEAGRAM'S V. O.		Quarts							
Blended Whiskey, distilled, aged and	86.8	Fifths	40.45	.35	4.80	.20	45.80	51.23	5.42
blended under the supervision of	86.8	Pints	50.96	.35	6.00	.24	57.55	64.38	3.41
the Canadian Government.		1/10 Gals.							
Seagram Distillers Corp. N. Y.	86.8	1/2 Pints	51.85	.35	6.00	.24	58.44	65.41	1.73
SEAGRAM'S ANCIENT BOTTLE GIN		Quarts							
Distilled from 100% Grain Neutral	90	Fifths	27.68	.35	4.80	.20	33.03	36.65	3.82
Spirits	90	Pints	34.95	.35	6.00	.24	41.54	46.11	2.41
		1/10 Gals.							
	90	1/2 Pints	35.70	.35	6.00	.24	42.29	46.97	1.23
SEAGRAM'S KING ARTHUR GIN		Quarts							
Distilled from 100% Grain Neutral	90	Fifths	23.98	.35	4.80	.20	29.33	32.40	3.35
Spirits	90	Pints	30.20	.35	6.00	.24	36.79	40.64	2.10
		1/10 Gals.							
	90	1/2 Pints	30.95	.35	6.00	.24	37.54	41.51	1.08
PENROSE RYE OR BOURBON		Quarts							
Bottled-in-Bond	100	Fifths	56.07	.35	6.00	.24	62.66	70.26	7.47
(Distilled in Canada under Cana-	100	Pints	57.14	.35	6.00	.24	63.73	71.85	3.50
dian Government Supervision)		1/10 Gals.							
	100	1/2 Pints	58.49	.35	6.00	.24	65.08	73.04	1.95

Must Be Signed By Official Duly Authorized To Bind Company

Date

(Do not write in this space)

Signed Sam Bernbach, State Manager

PLAINTIFF'S EXHIBIT NO. 6.

PRICE POSTINGS (PRODUCERS)

Under Contracts Subject to
INDIANA FAIR TRADE ACT
(Act of 1937, Chapter 17)

291 Illinois Bldg.

Indianapolis

DISTILLED SPIRITS

Date Filed July 20, 1947
Effective Date Aug. 1, 1947

Jos. E. Seagram & Sons Inc.
426 Chamber of Commerce Bldg.
Indianapolis, Indiana

Brand and Description	Proof	Size	F.O.B. Distillery Including Federal Tax Freight Gallons	State Tax Enforcement	Case Cost to Distributor Retailer	Minimum Bottle Price to Consumer			
KERSLER'S PRIVATE BLEND		Quarts							
Blended Whiskey 85 proof—straight	85	Fifths	25.62	.35	4.80	20	30.97	34.34	3.58
whiskies in this product are 3	85	Pints	32.24	.35	6.00	24	38.83	43.06	2.25
years or more old. 25% straight		1/10 Gals.							
whiskey—75% Grain Neutral Spirits	85	1/2 Pints	32.90	.35	6.00	24	39.58	43.92	1.15
SEAGRAM'S 5 CROWN		Quarts							
Blended Whiskey 86.8 proof—straight	86.8	Fifths	26.68	.35	4.80	20	32.03	35.54	3.71
whiskies in this product are 5	86.8	Pints	33.68	.35	6.00	24	40.27	44.60	2.33
years or more old. 27 1/4 straight		1/10 Gals.							
whiskey—72 1/2 Grain Neutral Spirits	86.8	1/2 Pints	34.43	.35	6.00	24	41.02	45.55	1.19
SEAGRAM'S 7 CROWN		Quarts							
Blended Whiskey 86.8 proof—straight	86.8	Fifths	30.08	.35	4.80	20	35.43	39.45	4.14
whiskies in this product are 5	86.8	Pints	37.92	.35	6.00	24	44.52	49.58	2.60
years or more old. 35% straight		1/10 Gals.							
whiskey—65% Grain Neutral Spirits	86.8	1/2 Pints	38.68	.35	6.00	24	45.27	50.44	1.32
SEAGRAM'S V. O.		Quarts							
Blended Whiskey distilled, aged and	86.8	Fifths	40.45	.35	4.80	20	45.80	51.23	5.42
blended under the supervision of	86.8	Pints	50.96	.35	6.00	24	57.55	64.38	3.41
the Canadian Government.		1/10 Gals.							
Seagram-Distillers Corp. N. Y.	86.8	1/2 Pints	51.85	.35	6.00	24	58.44	65.41	1.73
SEAGRAM'S ANCIENT BOTTLE GIN		Quarts							
Distilled from 100% Grain Neutral	90	Fifths	27.68	.35	4.80	20	33.03	36.65	3.82
Spirits	90	Pints	34.95	.35	6.00	24	41.54	46.11	2.41
		1/10 Gals.							
	90	1/2 Pints	35.70	.35	6.00	24	42.20	46.97	1.23
SEAGRAM'S KING ARTHUR GIN		Quarts							
Distilled from 100% Grain Neutral	90	Fifths	23.98	.35	4.80	20	29.33	32.40	3.35
Spirits	90	Pints	30.20	.35	6.00	24	36.79	40.64	2.10
		1/10 Gals.							
	90	1/2 Pints	30.95	.35	6.00	24	37.54	41.51	1.08
EDMUND RYE OR BOURBON		Quarts							
Bottled-in-Hand	100	Fifths	56.07	.35	6.00	24	62.66	70.26	7.47
(Distilled in Canada under Cana-	100	Pints	57.14	.35	6.00	24	63.73	71.49	3.80
dian Government Supervision)	100	1/10 Gals.							
	100	1/2 Pints	58.49	.35	6.00	24	65.08	73.04	1.95

Must Be Signed By Official Duly Authorized To Bind Company

Date

(Do not write in this space)

Signed William W. Behrman, State Manager.

PLAINTIFF'S EXHIBIT NO. 7.

(Stamp) Received Nov 5 1948. Trade Relations Dept.

PRICE POSTINGS (PRODUCERS)

Under Contracts Subject to
INDIANA FAIR TRADE ACT
(Act of 1937, Chapter 17)

DISTILLED SPIRITS

Calvert Dist. Corp.
35 E. Wacker Dr., Chicago, Ill.Date Filed
Effective Date

Brand and Description	Proof	Size	F.O.B. Distillery Including Federal Tax		Freight	State Tax Gallage Enforcement	Case Cost to		Minimum Bottle Price to Consumer
							Wholesaler	Retailer	
Lord Calvert		Quarts							
		Fifths	35.07		.35	4.99			
		Pints	44.18		.35	6.24	40.41	45.17	4.78
		1/10 Gals.					50.77	56.76	3.00
Calvert Res.		1/2 Pints	44.93		.35	6.24	51.52	57.63	1.52
		Quarts							
		Fifths	30.08		.35	4.99	35.32	39.44	4.14
		Pints	37.93		.35	6.24	44.52	49.58	2.60
Calvert Special		1/10 Gals.							
		1/2 Pints	38.68		.35	6.24	45.27	50.44	1.32
		Quarts							
		Fifths	26.68		.35	4.99	32.02	35.53	3.70
Calvert Gin		Pints	33.68		.35	6.24	40.27	44.69	2.33
		1/10 Gals.							
		1/2 Pints	34.43		.35	6.24	41.02	45.55	1.19
		Quarts							
		Fifths	23.98		.35	4.99	29.32	32.39	3.35
		Pints	30.20		.35	6.24	36.79	40.64	2.10
		1/10 Gals.							
		1/2 Pints	30.95		.35	6.24	37.54	41.51	1.08

Must Be Signed By Official Duly Authorized To Bind Company

Date.....
(Do not write in this space)

Signed Thos. E. Tarpey, State Mgr.

Plaintiff's Exhibit No. 7.

Original

(Stamp) Received Nov 5 1948. Trade Relations Dept.

PRICE POSTINGS (PRODUCERS)

Under Contracts Subject to
INDIANA FAIR TRADE ACT
 (Act of 1937, Chapter 17)
 201 Illinois Bldg.
 INDIANAPOLIS

DISTILLED SPIRITS

Calvert Distillers Corporation
 Chrysler Bldg., New York, N. Y.
 236 S. Ritter, Indianapolis.

Date Filed February 16, 1948
 Effective Date March 1, 1948

Brand and Description	Proof	Size	F.O.B. Distillery Including		State Tax		Case Cost to		Minimum Bottle Price to Consumer
			Federal Tax	Freight	Gallage	Enforcement	Distributor	Retailer	
CALVERT RESERVE	86.8	Quarts	37.33	.35	6.00	.24	43.92	48.80	5.13
35% Straight Whiskey		Fifths							
65% Grain Neutral Spirits		Pints							
15%—6 yrs. old		1/10 Gals.							
20%—5 yrs. old		1/2 Pints							
(Addition)		Quarts							

Must Be Signed By Official Duly Authorized To Bind Company

Date.....
 (Do not write in this space)

Signed Thos. E. Tarpey, State Mgr.

Plaintiff's Exhibit No. 7.

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PLAINTIFF'S EXHIBIT No. 8.

Authorized Producer's Distributors in Indiana.

Company Name, Seagram-Distillers Corporation.

Company Address, 426 Chamber of Commerce Building, Indianapolis, Ind.

Indiana Sales Manager, Mr. S. A. Bernbach, 1649 Alabama St., Indianapolis, Indiana.

Pursuant to Section 11, paragraphs A and B of Regulation No. 1 adopted by the Alcoholic Beverage Commission of Indiana effective June 21st, 1938, the undersigned manufacturer (strike out designations not applicable) of alcoholic spirituous beverages which are hereinafter named and which are sold and are intended for sale in Indiana, do, on this, the 30th day of October, 1946, register the following holders of permits to sell alcoholic spirituous beverages at wholesale to whom the undersigned has granted the sole and exclusive rights in the State of Indiana on the trade marks or labels of the alcoholic spirituous beverages listed on the pages hereinafter following which are filed herewith and made a part hereof.

Name

Address

1. Fred A. Beck Company, 214 S. Pennsylvania St., Indianapolis 4, Ind.
2. Conard Company, Inc., 421 S. E. Fifth St., Evansville 1, Indiana.
3. Ft. Wayne Drug Co., 127 West Wayne St., Ft. Wayne 1, Indiana.
4. General Liquors, Inc., 1602 W. Washington Ave., South Bend 21, Ind.
5. Highland Liquor Co., 1724 Wabash Avenue, Terre Haute, Indiana.
6. Kiefer-Stewart Company, 141 W. Georgia St., Indianapolis 9, Ind.
7. Midwest Liquor Dealers, Inc., 2320 Broadway, East Chicago, Indiana.
8. Mooney-Mueller-Ward Co., 501 Madison Ave., Indianapolis 6, Ind.
9. National Liquor Corp., 111 S. Pennsylvania, Indianapolis 4, Ind.

10. Reliable Liquor Wholesalers, 322 W. Fifth St., New Albany, Indiana.
11. Standard Liquors, Inc., 121 E. Fifth Avenue, Gary, Indiana.
12. Ft. Wayne Bottled Products, 121 E. Main St., Ft. Wayne, Indiana.

Company Name, Seagram-Distillers Corp.
By S. A. Bernbach.

Must be Signed by Official
Duly Authorized to Bind Company

Date, October 30, 1946.

(Received Nov. 1, 1946. Auditing Department.)

Authorized Producer's Distributors in Indiana.

Company Name, Jos. E. Seagram & Sons, Inc.

Company Address, 426 Chamber of Commerce Bldg., Indianapolis, Indiana.

Indiana Sales Manager, W. W. Behrman.

Pursuant to Section 11, paragraphs A and B of Regulation No. 1 adopted by the Alcoholic Beverage Commission of Indiana effective June, 21st, 1938, the undersigned manufacturer, processor, bottler, vendor (strike out designations not applicable) of alcoholic spirituous beverages which are hereinafter named and which are sold and are intended for sale in Indiana, do, on this, the 22nd day of July, 1947, register the following holders of permits to sell alcoholic spirituous beverages at wholesale to whom the undersigned has granted the sole and exclusive rights in the State of Indiana on the trade marks or labels of the alcoholic spirituous beverages listed on the pages hereinafter following which are filed herewith and made a part thereof.

Name

Address

1. Fred A. Beck Company, 214 S. Pennsylvania St., Indianapolis.
2. Conard Company, Inc., 421 S. E. 5th St., Evansville.
3. Fort Wayne Bottled Products, 121 East Main St., Fort Wayne.

4. Fort Wayne Drug Company, 127 West Wayne St., Fort Wayne.
5. General Liquors, Inc., 1602 W. Washington St., South Bend.
6. Highland Liquors Company, 1724 Wabash Avenue, Terre Haute.
7. Midwest Liquor Dealers, Inc., 2320 Broadway, East Chicago.
8. Mooney-Mueller-Ward Company, 501 Madison Avenue, Indianapolis.
9. National Liquor Corporation, 111 S. Pennsylvania St., Indianapolis.
10. Reliable Liquor Wholesalers, 322 West 5th St., New Albany.
11. Standard Liquors, Inc., 121 E. 5th Avenue, Gary.

Company Name

Jos. E. Seagram & Sons, Inc.

By: Wm. W. Behrman

Must be Signed by Official State Manager
Duly Authorized to Bind Company.

(Received July 23, 1947. Auditing Department.)

64

PLAINTIFF'S EXHIBIT No. 10.

Authorized Producer's Distributors in Indiana.

Company Name, Calvert Distillers Corporation.

Company Address, 35 East Wacker Drive, Chicago, Ill.

Indiana Sales Manager, Thos. E. Tarpey, 236 S. Ritter Ave., Indianapolis, Ind.

Pursuant to Section 11, paragraphs A and B of Regulation No. 1 adopted by the Alcoholic Beverage Commission of Indiana effective June 21st, 1938, the undersigned manufacturer, processor, bottler, vendor (strike out designations not applicable) of alcoholic spirituous beverages which are hereinafter named and which are sold and are intended for sale in Indiana, do, on this, the 13th day of November, 1946, register the following holders of permits to sell alcoholic spirituous beverages at wholesale to whom the undersigned has granted the sole and exclusive rights in the State of Indiana on the trade marks or labels of the

alcoholic spirituous beverages listed on the pages herein-after following which are filed herewith and made a part thereof.

Name	Address
1. <i>Marven Lasky, dba Capitol Wine & Liquor Co., 220 S. Penn. St., Indianapolis.</i>	
2. Fort Wayne Drug Co., 127 W. Wayne Ave., Fort Wayne.	
3. Gary Wine & Liquor Corp., 410 Washington St., Gary.	
4. General Liquors, Inc., 1602 W. Washington, South Bend.	
5. The Hoosier Liquors, Inc., 121 N. W. Second St., Evansville.	
6. Mid State Liquor Co., 34 W. Georgia St., Indianapolis.	
7. Minardo Bros. Fruit Co., 231 Chestnut St., Lafayette.	
8. Palumbo Distributing Co., 428 Melbourne Ave., Logansport.	
9. Quality Liquors Wholesalers Corp., 107 S. Chestnut St., Seymour.	
10. <i>U. S. Wholesale Co., 24 N. Noble St., Indianapolis, Ind. (to be discontinued 1/1/47).</i>	
11. <i>Kiefer-Stewart Co., 141 W. Georgia St., Indianapolis, Ind.</i>	

Company Name

Calvert Distillers Corporation

William H. Schwalb.

Must be Signed by Official

Duly Authorized to Bind Company.

Date 11/13/46.

(Received Nov. 16, 1946. Auditing Department.)

65 DEFENDANTS' EXHIBIT No. 1-a.

November 1, 1946.

(Letterhead of Dearborn Liquors, Incorporated,
Aurora, Indiana)

Alcoholic Beverage Commission
Illinois Building
Indianapolis, Indiana

Attention: Mr. Myron Johnson,
Public Relations Director

Dear Sir:

On all our present filings on whiskies, brandies, Rums,
and Gins, we propose to increase our selling price to Re-
tailers an amount equal to 15% of the new Federal & State
taxes on which we formerly could take no profit.

Yours very truly,

Dearborn Liquors, Inc.
W. E. Barrott, *Pres.*

WEB:RL

(Approved, Indiana Alcoholic Beverage Commission,
Trade Relations Department, by Merton A. Johnston, date
11/2/46.)

(Received Nov. 2, 1946. Auditing Department.)

300

Defendants' Exhibit No. 1-b.

66

DEFENDANTS' EXHIBIT No. 1-b.

(Letterhead of Dearborn Liquors, Incorporated,
Aurora, Indiana)

November 1, 1946.

Alcoholic Beverage Commission
Illinois Building
Indianapolis, Indiana

Attention: Mr. Myron Johnson,
Public Relations Director

Dear Sir:

On all our present filings on Fruit Brandies, Cordials,
and Liqueurs, we propose to increase our selling price to
Retailers an amount equal to 20% of the new Federal and
State taxes on which we formerly could take no profit.

Yours very truly,

Dearborn Liquors, Inc.
W. E. Barrott, *Pres.*

WEB:RL

(Approved, Indiana Alcoholic Beverage Commission,
Trade Relations Department, by Merton A. Johnston, date
11/2/46.)

(Received Nov. 2, 1946. Auditing Department.)

-67

DEFENDANTS' EXHIBIT No. 1-c.

(Letterhead of Dearborn Liquors, Incorporated,
Aurora, Indiana)

November 1, 1946.

Alcoholic Beverage Commission
Illinois Building
Indianapolis, Indiana

Attention: Mr. Myron Johnson,
Public Relations Director

Dear Sir:

On all our present filings on Wines, we propose to increase our selling price to Retailers an amount equal to 25% of the new Federal and State taxes on which we formerly could take no profit.

Yours very truly,

Dearborn Liquors, Inc.

W. E. Barrott, *Pres.*

WEB:RL

(Approved, Indiana Alcoholic Beverage Commission,
Trade Relations Department, by Merton A. Johnston, date
11/2/46.)

(Received Nov. 2, 1946. Auditing Department.)

68

DEFENDANTS' EXHIBIT No. 2.

(Letterhead of Fort Wayne Bottled Products Corporation,
Fort Wayne, Indiana.)

November 6, 1946.

Indiana Alcoholic Beverage Commission
Room 211 Illinois Building
Indianapolis, Indiana

Attention: Mr. Merton Johnson

Dear Sir:

After careful consideration, I believe that it is to the best interest of our industry, to hold the price line on the sale of whiskey, wine and cordials and the policy of our company is as follows:

We shall take a 15% mark-up over and above our actual cost, plus freight on all whiskies and gins, 20% mark-up of cordials and liqueurs over and above the total cost plus freight, 25% mark-up to be taken on all wines.

It is my sincere belief that if all Indiana wholesalers adhere to this policy, some of the evils which we all know were prevalent prior to the war may be eliminated.

You may use this letter as your authority to change my present price postings to conform with the above percentages.

Thanking you for the courtesies extended to us at the meeting last Thursday, I remain,

Sincerely yours,

Robert L. Shambaugh,
President.

RLS:jb

(Approved, Indiana Alcoholic Beverage Commission,
Trade Relations Department, by M. A. Johnston, date
11/7/46.)

(Received Nov. 7, 1946. Auditing Department.)

69

DEFENDANTS' EXHIBIT NO. 3.

(Letterhead of Fred A. Beck Co., Inc., Indianapolis 4,
Indiana.)

Nov. 1, 1946

Indiana Alcoholic Beverage Commission
Attn: Mr. M. Johnston
201 Illinois Bldg.
Indianapolis, Indiana

Dear Mr. Johnston:

Will you please give us authority beginning November 6th, 1946, to offer merchandise at a mark-up over cost, including the 1944 Federal tax and additional state tax which was effective in May 1945, to the retail permittees? Mark-up percents to be as follows: 15% distilled spirits, 20% cordials and sundry items, 25% on wines.

We, of course, understand thoroughly that on any increase in price we must file with your department our posting before offering the merchandise for sale.

Trusting that this meets with your approval,

Very truly yours,

Fred A. Beck Co., Inc.,
Fred A. Beck.

FAB:n

(Received Nov. 2, 1946. Auditing Department.)

(Approved: Indiana Alcoholic Beverage Commission,
Trade Relations Department. By Merton A. Johnston.
Date 11/2/46.)

70

DEFENDANTS' EXHIBIT NO. 4.

(Letterhead of LaSalle Liquor Corp., South Bend 18,
Indiana.)

November 1, 1946

Mr. Merton Johnston
Alcoholic Beverage Commission
201 Illinois Building
Indianapolis, Indiana

Dear Mr. Johnston:

Please consider this as our request to adjust prices to include a full 15% mark-up on spiriteous beverages, 20% on cordials, and 25% on wine—on the total cost including all taxes and freight on all merchandise on hand at this date which have not been subject to an increase from our suppliers.

It being understood that as the prices are increased by our supplier we are to file in the regular manner.

Very truly yours,

LaSalle Liquor Corp.,
Clyde Deetz,

Vice Pres. & Gen. Mgr.

CD:mks

(Received Nov. 2, 1946. Auditing Department.)

(Approved: Indiana Alcoholic Beverage Commission,
Trade Relations Department. By Merton A. Johnston.
Date 11/2/46.)

71

DEFENDANTS' EXHIBIT NO. 5.

(Letterhead of Midwest Liquor Dealers Inc., East Chicago, Indiana.)

November 1, 1946

Mr. Merton A. Johnston, Director
Trade Relations Department
Alcoholic Beverage Commission
201 Illinois Building
Indianapolis, Indiana

Dear Mr. Johnston:

Permission is respectfully requested for blanket changes of our current wholesale selling prices on file with your department as follows:

- 15% above F.O.B. producer's cost, plus all tax, plus freight on distilled spirits
- 20% above producer's cost, plus all tax, plus freight on all cordials, compounds and sundry items of classification.
- 25% above producer's cost, plus all tax, plus freight on all vinous beverages

Subsequent price changes will be filed upon each producer increase or decrease in routine manner prescribed by your department on the classifications outlined above.

Please be assured that we appreciate your valuable cooperation very much.

Yours very truly,
Midwest Liquor Dealers,
Inc.,
Wm. S. Hicks,
Secretary-Treasurer.

MSH:IK

(Received Nov. 6, 1946. Auditing Department.)

(Approved: Indiana Alcoholic Beverage Commission,
Trade Relations Department. By Merton A. Johnston.
Date 11/6/46.)

72

DEFENDANTS' EXHIBIT NO. 6.

(Letterhead of Fort Wayne Drug Company, Fort Wayne, Ind.)

November 5, 1946

Mark your reply attention of RFR:ACM

Mr. M. A. Johnston, Director
Trade Relations Department
Indiana Alcoholic Beverage Division
Indianapolis, Indiana

Dear Sir:

Due to increased warehouse costs, etc., we are increasing our posted prices to the extent of 15 per cent on Spirits, 20 per cent on Cordials and Liqueurs, 25 per cent on Wines, Vermouths, and Champagne, only on the April 1, 1944 Federal and May 1, 1945 Indiana State Tax increases. This change will go into effect November 7, 1946 and we request the approval of your department.

A new price list now in preparation, will be furnished if desired.

Yours very truly,

Fort Wayne Drug Company,
R. F. Reiter.

(Received Nov. 6, 1946. Auditing Department.)

(Approved: Indiana Alcoholic Beverage Commission,
Trade Relations Department. By Merton A. Johnston.
Date 11/6/46.)

73

DEFENDANTS' EXHIBIT NO. 7.

(Letterhead of Capitol Wine & Liquor Company,
Indianapolis 4, Ind.)

November 4, 1946

Mr. Merton A. Johnston, Director
Trade Relations Department
Alcoholic Beverages Division
201 Illinois Building
Indianapolis, Indiana

Dear Mr. Johnston:

We wish to request your permission to offer merchandise to the retail trade beginning November 6th at a fifteen per cent mark-up over costs which is to include the last federal tax and the last new state tax.

We understand, though, that any increase in price from our suppliers to us will have to be filed as heretofore on regular filing forms before offering same for sale to retail permittees.

Thanking you for your attention and cooperation, we are,

Yours very truly,

Capitol Wine & Liquor
Company,
M. M. Lasky.

MML:hs

(Received Nov. 6, 1946. Auditing Department.)

(Approved: Indiana Alcoholic Beverage Commission,
Trade Relations Department. By Merton A. Johnston.
Date 11/6/46.)

74

DEFENDANTS' EXHIBIT NO. 8.

(Letterhead of Kiefer-Stewart Company, Indianapolis 9,
Indiana.)

November 1, 1946

Indiana Alcoholic Beverage Commission
Illinois Building
Indianapolis, Indiana

• Attention: Mr. Merton Johnson

Gentlemen:

Beginning November 6th, we will mark up all alcoholic beverages on the following basis:

Spirits—15%—over our cost, including all taxes, plus freight.

Cordons—20%

Wines—25%

Any merchandise we receive in the future at an advanced price we will file as soon as we received notification of same.

Yours very truly,

Kiefer-Stewart Company,
E. C. Diederich.

ECD:pw

(Received Nov. 2, 1946. Auditing Department.)

(Approved: Indiana Alcoholic Beverage Commission,
Trade Relations Department. By Merton A. Johnston.
Date 11/2/46.)

75

DEFENDANTS' EXHIBIT NO. 9.

(Letterhead of Gary Wine and Liquor Corp., Gary,
Indiana.)

Nov. 4, 1946

Mr. M. A. Johnson
Alcoholic Beverages Division
201 Illinois Building
Indianapolis, Ind.

Dear Sir:

We wish to advise you that as of Wednesday, November 6, 1946 we are taking our mark-up of 15% on all whiskies, 20% on all cordials and 25% on all wines. That is, on our last federal and state taxes.

Hoping this meets with your approval, remain

Sincerely yours,

Gary Wine & Liquor Corp.,
Max Stryk, —

Pres.

MS:bl

(Received Nov. 6, 1946. Auditing Department.)

(Approved: Indiana Alcoholic Beverage Commission,
Trade Relations Department. By Merton A. Johnston.
Date 11/6/46.)

DEFENDANTS' EXHIBIT NO. 10.

(Letterhead of Crescent Liquors, Inc., Evansville 8,
Indiana.)

November 1, 1946

Mr. Merton A. Johnston, Director
Trade Relations Dept.
Alcoholic Beverage Comm.
201 Illinois Bldg.
Indianapolis, Ind.

Dear Mr. Johnston:

This is to advise your office that, under the date of November 6th we are raising our prices which are on file in your office.

This increase will be taken on the last federal tax of November 1st, 1944 and the increase in state tax as of April 1st, 1945 as follows: Fifteen percent on distilled spirits, twenty percent on cordials and specialties and twenty-five percent on wines.

Yours very truly,

Crescent Liquors, Inc.,
C. C. Bicking.

CCB:RI

(Received Nov. 2, 1946. Auditing Department.)

(Approved: Indiana Alcoholic Beverage Commission,
Trade Relations Department. By Merton A. Johnston.
Date 11/2/46.)

77

DEFENDANTS' EXHIBIT NO. 11.

(Letterhead of Conard Company, Inc., Evansville, Indiana.)

November 1, 1946.

Mr. Merton Johnston
201 Illinois Bldg.
Indianapolis, Indiana

Dear Mr. Johnston:

We are advancing the prices on all of our whiskies, cordials, and wines, to include markup on the last Federal and State Taxes.

In order to expedite these changes, we ask you for your O. K.

Very truly yours,

Conard Company, Inc.,

Alvin R. Brown,

Vice-President.

ARB:GM

15% on distilled spirits.

20% on cordials and sundry items.

25% on wines.

(Received Nov. 2, 1946. Auditing Department.)

(Approved. Indiana Alcoholic Beverage Commission,
Trade Relations Department. By Merton A. Johnston.
Date: 11/2/46.)

78 DEFENDANTS' EXHIBIT NO. 12.

(Letterhead of The Hoosier Liquors, Inc., Evansville,
Indiana.)

November 4, 1946.

Indiana Alcoholic Beverage Commission
Trade Relations Department
Illinois Bldg.
Indianapolis, Indiana

Attention: Mr. Merton Johnston.

Dear Mr. Johnston:

Effective November 6th, we are going out with new prices on our merchandise, making our mark-up 15% on liquors, 20% on Cordials, 25% on Wines, on our total cost from the supplier or distiller. Of course, the only change in our price policy will be we are taking this mark-up on our former cost, plus the last Federal and State increase in taxes.

On any items which we will not figure our mark-up this way, we will file as close-outs.

Trusting you will okay this, and with kindest regards, we are

Yours truly,

The Hoosier Liquors, Inc.,

By B. H. Riepe,

President.

BHR/ko

(Received Nov. 6, 1946. Auditing Department.)

(Approved. Indiana Alcoholic Beverage Commission,
Trade Relations Department. By M. A. J. Date: 11/6/46.)

79

DEFENDANTS' EXHIBIT NO. 13.

(Letterhead of Mid-State Liquor Company, Indianapolis, .
Indiana.)

November 6, 1946.

Mr. Merton Johnston
Indiana Alcoholic Beverage Commission
201 Ill. Bldg.
Indianapolis, Indiana

Dear Mr. Johnston:

After careful consideration, it is the intention of the Mid-State Liquor Company to file new prices on all our brands.

Our percentage of markup will be:

Distilled Spirits	15%
Cordials & Liq.	20%
Wines	25%

These percentages will be based on our over-all cost in Indianapolis, and new prices will be effective November 6th.

We hope this will meet with your approval.

Sincerely yours,

A. F. Burris,
Gen. Mgr.

(Received Nov. 6, 1946. Auditing Department.)

(Approved. Indiana Alcoholic Beverage Commission, Trade Relations Department. By M. A. Johnston. Date: 11/6/46.)

AFB:GNC

DEFENDANTS' EXHIBIT NO. 14.

(Letterhead of General Liquors, Inc., South Bend, Ind.)

November 1, 1946.

Mr. M. A. Johnston
Indiana Alcoholic Beverage Commission
Trade Relations Department
201 Illinois Building
Indianapolis 9, Indiana

Dear Mr. Johnston:

We wish to increase the price on our spirituous liquor, cordials, sundry items and wines, by taking a mark-up on the last federal and state taxes as follows:

15% on distilled spirits.

20% on cordials and sundry items.

25% on wines.

Whenever we receive a price change from the producer, we will at that time file on forms X67 and X68 the new prices with your office.

Hoping this meets with your approval, we remain

Very truly yours,

General Liquors, Inc.,
H. R. Stout.

HRS:os

(Received Nov. 2, 1946. Auditing Department.)

(Approved. Indiana Alcoholic Beverage Commission,
Trade Relations Department. By Merton A. Johnston.
Date: 11/2/46.)

81

DEFENDANTS' EXHIBIT NO. 15.

(Letterhead of Minardo Bros. Fruit Co., Inc., Lafayette,
Indiana.)

October 31, 1946.

Trade Relations Department,
Alcoholic Beverage Commission,
201 Illinois Bldg.,
Indianapolis 9, Indiana

Gentlemen:

With the discontinuance of price controls on Liquors and Wines, and with the approval of your department, we wish to make the following adjustments to our price filings now in your office:

All Distilled Spirits—15% markup over all costs including all Federal Taxes, State Taxes and freight.

Cordials, Liquors and Specialties—20% markup over all costs including all Federal Taxes, State Taxes and freight.

Wines—25% markup over all costs including all Federal Taxes, State Taxes and freight.

It is understood that the above adjustments are to be made to the prices you now have on file, those filings not carrying a markup on the April 1, 1944 Federal Tax nor the May 1, 1945 State Tax. Any further changes will be made in the regular manner.

Above prices will be effective November 6, 1946.

Very truly yours,

Minardo Bros. Fruit Co., Inc.,

Mike Minardo,

President.

(Received Nov. 1, 1946. Auditing Department.)

(Approved. Indiana Alcoholic Beverage Commission,
Trade Relations Department. By Merton A. Johnston,
Director. Date: 11/1/46.)

316

Defendants' Exhibit No. 16.

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DEFENDANTS' EXHIBIT NO. 16.

(Letterhead of National Liquor Corporation, Indianapolis,
Indiana.)

November 4, 1946.

Mr. Merton A. Johnston, Director
Trade Relations Department
Alcoholic Beverages Division
201 Illinois Building
Indianapolis 9, Indiana

Dear Mr. Johnston:

We are requesting permission to revise our wholesale prices as follows:

15% mark up on distilled spirits including last Federal and state tax increases.

20% mark up on cordials including last Federal and state tax increases.

25% mark up on wines including last Federal and State tax increases.

Very truly yours,
National Liquor Corporation,
Jules J. Fansler,
President.

jjf/g

(Received Nov. 6, 1946. Auditing Department.)

(Approved. Indiana Alcoholic Beverage Commission,
Trade Relations Department. By M. A. Johnston. Date:
11/6/46.)

83

DEFENDANTS' EXHIBIT NO. 17.

(Letterhead of Mooney-Mueller-Ward Co., Indianapolis,
Indiana.)

October 31, 1946.

Alcoholic Beverages Commission,
Trade Relations Dept.,
Indianapolis, Ind.

Gentlemen:—

The O.P.A. ceiling on liquor having been removed, we request authority to add the following to the prices which we already have on file in your office:

15% mark-up on the last additional Federal Tax and the additional Indiana State Tax on Distilled Spirits.

20% mark-up on the last additional Federal Tax and the additional Indiana State Tax on Cordials.

25% mark-up on the last additional Federal Tax and the additional Indiana State Tax on Wines.

Yours very truly,

Mooney-Mueller-Ward Co.,

William J. Freaney.

(Received Nov. 1, 1946. Auditing Department.)

(Approved. Indiana Alcoholic Beverage Commission,
Trade Relations Department. By Merton A. Johnston.
Date: 11/1/46.)

WJF/GR

Effective date 11/6/46

DEFENDANTS' EXHIBIT NO. 18.

(Letterhead of Palumbo Distributing Co., Logansport,
Indiana.)

Alcoholic Beverage Commission
201 Illinois Bldg.
Indianapolis, Indiana

Attention: Mr. M. A. Johnston

Dear Sir:

In view of Alcoholic Beverages having been removed from Price Control by the office of Price Administration we wish to hereby make application to you for approval of the following price increases.

Under prior existing regulations we were not permitted our regular markup of 15% on the last Federal tax increase of April 1, 1944 and the State Gallonage tax increase of May 1, 1945.

We now request permission to include these two tax increases in figuring our make up of 15% and wish to take this opportunity of thanking you for your co-operation.

Very truly yours,

Palumbo Distributing Company,
M. F. Olinger,

Manager.

Effective date 11/6/46.

(Received Nov. 1, 1946. Auditing Department.)

(Approved. Indiana Alcoholic Beverage Commission,
Trade Relations Department. By Merton A. Johnston.
Date: 11/1/46.)

85

DEFENDANTS' EXHIBIT NO. 19.

(Letterhead of U. S. Wholesale Company, Importers, Indianapolis, Indiana.)

November 4, 1946.

Alcohol Beverage Commission
c/o Illinois Bldg.,
Indianapolis, Ind.

Attention: Mr. M. E. Johnston.

Gentlemen: For your information effective Wednesday November 6th, we are increasing our prices—our mark up based on F. O. B. Distillery including Federal Tax, State Tax and Freight.

Very truly yours,
U. S. Wholesale Co., Inc.,
J. A. Langan.

(Received Nov. 6, 1946. Auditing Department.)

(Approved. Indiana Alcoholic Beverage Commission,
Trade Relations Department. By M. A. J. Date: 11/6/46.)

86

DEFENDANTS' EXHIBIT NO. 20.

(Letterhead of Standard Liquors, Inc., Gary, Indiana.)

November 1st, 1946.

Mr. Mert A. Johnston
Trade Relations Department
201 Illinois Building
Indianapolis 9, Indiana

Dear Mr. Johnston:

We beg to advise your office that we are taking our regular mark-up on the last Federal and State tax increases and are adding same to our cost of merchandise now on file with your department.

Yours very truly,

Standard Liquors, Inc.,

C. A. Murray,

Manager.

CAM:av

(Received Nov. 2, 1946. Auditing Department.)

(Approved. Indiana Alcoholic Beverage Commission,
Trade Relations Department. By M. A. Johnston. Date:
11/2/46.)

Effective date Nov. 6, 1946.

87

DEFENDANTS' EXHIBIT NO. 21.

(Letterhead of The Quality Liquors Wholesalers Corp.,
Seymour, Indiana.)

November 1, 1946.

Indiana Alcoholic Beverage Commission
Trade Relations Department
201 Illinois Building
Indianapolis, Indiana

Att: M. A. Johnson, Director.

Dear Sir:

We wish to request permission to increase our prices
on all merchandise to include markup on all taxes, hereto-
fore, excluded.

Yours very truly,

The Quality Liquors Wholesalers Corp.,
Chas. A. Scull,
President.

(Received Nov. 2, 1946. Auditing Department.)

(Approved. Indiana Alcoholic Beverage Commission,
Trade Relations Department. By M. A. Johnston. Date:
11/2/46.)

DEFENDANTS' EXHIBIT NO. 22.

(Letterhead Highland Liquors Co., Terre Haute, Indiana.)

November 1, 1946.

Indiana Alcoholic Beverage Commission
201 Illinois Bldg.,
Indianapolis, Indiana.

Attn: Mr. Merton A. Johnston, Director, Trade Relations.

Gentlemen:

Highland Liquors Company requests permission to include all Federal and State taxes for mark-up purposes. Our mark-ups will remain as at present—15% on Spirits, 20% on Liqueurs and Cordials, and 25% on Wines—as interpreted under MPR 445, Office of Price Administration.

If this request is granted all items which we have filed with you will receive the same mark-up equally. In case Highland Liquors Company would find it to be good business to take a lesser price for some item than the above formula, we will follow Section 14 of your Regulation No. 10, commonly known as the "close-out" regulation.

We respectfully ask your consideration of this request, and in case it is granted we would like to be informed of its effective date.

Respectfully yours,

Highland Liquors Co.,

Wm. H. Adams,

General Managing Partner.

Effective date 11/6/46.

(Approved. Indiana Alcoholic Beverage Commission,
Trade Relations Department. By Merton A. Johnston,
Director. Date: 11/1/46.)

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DEFENDANTS' EXHIBIT No. 23.

No. 9514 (Criminal)

IN THE DISTRICT COURT OF THE UNITED STATES

for the District of Colorado.

November Term, 1941.

United States of America

vs.

Colorado Wholesale Wine and Liquor Dealers Association,
Inc., et al.

INDICTMENT.

James McL. Henderson,
John W. Porter,

Special Assistants to the Attorney General.

James R. Browning,
Donald W. Marshall,
Stephen L. R. McNichols,

Special Attorneys.

Thurman Arnold,
Assistant Attorney General.

Thomas J. Morrissey,
United States Attorney.

Returned March 12, 1942

90 IN THE DISTRICT COURT OF THE UNITED STATES.
• • (Caption—9514) • •

92 INDICTMENT.

United States of America, } ss:
District of Colorado.

The Grand Jurors of the United States of America, duly impaneled, sworn, and charged in the District Court of the United States for the District of Colorado at the November 1941 term of said Court, inquiring within
93 and for the said District at said term of said Court, do upon their oaths find and present as follows, to wit:

Count One.

I. Period of Time Covered by This Count.

1. Each of the allegations hereinafter contained in this count shall be deemed to refer to the period of time beginning in or about the month of June 1935, the exact date being to the Grand Jurors unknown, and continuing thereafter up to and including the date of the presentation of this indictment, unless otherwise expressly stated.

II. Definitions.

2. Whenever the term "spirituous liquor" shall be used in this indictment it shall be deemed to mean alcoholic beverages, of whatever description, containing 24% or more of alcohol, by volume.

3. Whenever the term "alcoholic beverages" is used in this indictment it shall be deemed to mean spirituous liquor, wine, and beer.

4. Whenever the term "producers" is used in this indictment it shall be deemed to mean persons, partnerships, and corporations engaged in manufacturing, distilling, fermenting, brewing, rectifying, processing, or importing any alcoholic beverage, or any parent, subsidiary, or affiliated corporation thereof engaged in the sale of the products of such person, partnership, or corporation.

5. Whenever the term "wholesalers" is used in this indictment it shall be deemed to mean persons, partnerships, and corporations doing business in the State of Colorado engaged, in whole or in part, in the purchase of alcoholic beverages for resale to retailers.

6. Whenever the term "retailers" is used in this indictment it shall be deemed to mean persons, partnerships, and corporations doing business in the State of Colorado engaged, in whole or in part, in the sale and distribution of alcoholic beverages in bottles and by the case to the consuming public.

7. Whenever the term "wholesale prices" is used in this indictment it shall be deemed to mean prices charged for alcoholic beverages sold by wholesalers to retailers.

8. Whenever the term "retail prices" is used in this indictment it shall be deemed to mean prices charged for alcoholic beverages sold by retailers to the consuming public.

9. Whenever the term "wholesale discount" is used in this indictment it shall be deemed to mean a discount for quantity purchases and the like allowed from or upon the wholesale price.

III. The Defendants.

10. The Colorado Wholesale Wine and Liquor Dealers Association, Inc., (hereinafter sometimes designated as the Wholesale Association) is hereby indicted and made a defendant herein. Said Association is a corporation organized and existing under the laws of the State of Colorado, with its principal place of business in Denver, Colorado. The membership of said Association is composed of wholesalers doing business as such within the State of Colorado.

11. The Colorado Package Liquor Association, Inc., (hereinafter sometimes referred to as the Package Association) is hereby indicted and made a defendant herein. Said Association is a corporation organized and existing under the laws of the State of Colorado, with its principal place of business in Denver, Colorado. The membership of said Association is composed of retailers doing business as such within the State of Colorado. Said defendant Package Association and defendant Wholesale Association are sometimes hereinafter referred to as "defendant associations."

12. The following named corporations are hereby indicted and made defendants herein. Each is a corporation doing business as a producer, organized and existing under the laws of the State, and having its principal offices at the city indicated below. These defendants will sometimes hereinafter be referred to as "defendant producers."

Name of producer	State of incorporation	Principal offices
Hiram Walker Incorporated	Delaware	Detroit, Michigan.
Seagram-Distillers Corporation	Delaware	New York, New York.
Waterfall & Frazier Distillery Company	Missouri	Kansas City, Missouri.
Schenley Distillers Corporation	Delaware	New York, New York.
Gooderham & Worts, Limited	Delaware	Detroit, Michigan.
Jas. Barclay & Co., Limited	Delaware	Detroit, Michigan.
Ben-Burk, Inc.	Massachusetts	Boston, Massachusetts.
Brown Forman Distillers Corporation	Delaware	Louisville, Kentucky.
Calvert-Distillers Corporation	Maryland	New York, New York.
Frankfort Distilleries, Incorporated	West Virginia	Louisville, Kentucky.
Glenmore Distilleries Company	Kentucky	Louisville, Kentucky.
National Distillers Products Corporation	Virginia	New York, New York.
The Fleischmann Distilling Corporation	New York	New York, New York.
William Jameson & Co., Inc.	Delaware	New York, New York.
D. J. Bielzoff Products Company	Illinois	Chicago, Illinois.
Garrett & Company, Incorporated	New York	Brooklyn, New York.
The American Distilling Company	Maryland	New York, New York.
Somerset Importers, Ltd.	Delaware	New York, New York.
East-Side Winery	California	Lodi, California.

96 13. The following named corporations are hereby indicted and made defendants herein. Each is a corporation doing business as a wholesaler, organized and existing under the laws of the State, and having its principal offices at the city indicated below. Certain of these corporations, as indicated below, are members of defendant Wholesale Association:

Name of corporation	State of incorporation	Principal offices
Beuler-Lewin, Inc.	Colorado	Denver, Colorado, Member, Wholesale Association.
Davis Bros., Inc.	Colorado	Denver, Colorado, Member, Wholesale Association.
Liquors, Inc.	Colorado	Denver, Colorado, Member, Wholesale Association.
A. Carbone and Company, Inc.	Colorado	Denver, Colorado, Member, Wholesale Association.
McKesson & Robbins, Incorporated	Maryland	New York, New York, Member, Wholesale Association.
Colorado Beverage Company	Colorado	Denver, Colorado, Member, Wholesale Association.
The C. D. Smith Drug Co.	Colorado	Grand Junction, Colorado, Member, Wholesale Association.
Colorado Alcohol Company	Colorado	Denver, Colorado.

14. The following named individuals are hereby indicted and made defendants herein. Each of the said individuals is or has been associated, in the capacity indicated below, with one of the defendant associations or with one of the defendant corporations other than the defendant associations, or both, as indicated below. Said individual defendants, during the period covered by this indictment and within three years next preceding the date of its presentation, have been actively engaged in the management, direction, or operation of the affairs, policies, and activities of the respective defendant organizations with which they are or have been associated, as indicated below, particularly those affairs, policies, and activities of the said 97 defendant organizations described in this indictment:

Name of individual	Residence	Business affiliation	Organization affiliation
Burg, Morris L.....	Denver, Colo.	President, Liquors, Inc.....	Director, Wholesale Association.
Carbone, John A.....	Denver, Colo.	President, A. Carbone and Company, Inc.	Director and Ex-President, Wholesale Association.
Carroll, Edward J.....	Denver, Colo.	Employee, Davis Bros., Inc.	Ex-Director, Wholesale Association.
Davis, John C.....	Denver, Colo.	President and General Manager, Davis Bros., Inc.	Ex-Director and Ex-President, Wholesale Association.
Reuler, George C.....	Denver, Colo.	President, Reuler-Lewin, Inc.	Director and Treasurer, Wholesale Association.
Rothberg, Abraham.....	Denver, Colo.	Employee, Sarah Zerobnick, doing business as Midwest Liquor Company.	Director, Wholesale Association.
Stenzel, Raymond O.....	Denver, Colo.	Manager, Liquor Sales, McKesson & Robbins, Incorporated.	Director and Ex-Secretary, Wholesale Association.
Wheat, George M.....	Denver, Colo.	Ex-Executive Secretary, Package Association.
Zerobnick, Joseph.....	Denver, Colo.	Employee, Sarah Zerobnick, doing business as Midwest Liquor Company.	Representative to Wholesale Association.
Campbell, E. J.....	Denver, Colo.	District Sales Manager, Waterfill & Frazier, Distillery Company.	
Distasi, Angelo.....	Denver, Colo.	District Sales Manager, Calvert-Distillers Corporation.	
Franzen, Arthur L.....	Denver, Colo.	District Sales Manager, Seagram-Distillers Corporation.	
Harlow, Cecil B.....	Denver, Colo.	Division Sales Manager, Schenley Distillers Corporation.	
Langran, Loyce M.....	Dallas, Texas	District Sales Manager, Glenmore Distilleries Company.	

Defendants' Exhibit No. 23.

Name of individual	Residence	Business affiliation	Organization affiliation
Lowenstein, David H.....	Denver, Colo.	Division Sales Manager, Garrett & Company, Incorporated.	
Nier, Harry K.....	Denver, Colo.	District Sales Manager, Hiram Walker Incorporated.	
Sullivan, Leo	Denver, Colo.	District Sales Manager, Brown Forman Distillers Corporation.	
Webster, Herbert D.....	Denver, Colo.	District Sales Manager, National Distillers Products Corporation.	
Whitacre, Earl N.....	Denver, Colo.	District Sales Manager, Frankfort Distilleries, Incorporated.	
Cursey, Julian W.....	San Francisco, California.	Regional Sales Manager, National Distillers Products Corporation.	
Deateale, R. E.....	Louisville, Kentucky.	Sales Manager, Glenmore Distilleries Company.	
Fischel, Victor A.....	New York, New York.	General Sales Manager, Seagram-Distillers Corporation.	
McLaughlin, D. F.....	San Francisco, California.	Western Regional Sales Manager, Schenley Distillers Corporation.	
Modlish, R. F.....	San Francisco, California.	Regional Coordinator, Schenley Distillers Corporation.	
Nauheim, Milton J.....	New York, New York.	Executive Vice-President, Schenley Distillers Corporation.	
Sabin, Joseph W.....	Chicago, Illinois.	Regional Sales Manager, The Fleischmann Distilling Corporation.	
Sobel, Max	San Francisco, California.	Western Division Sales Manager, Seagram-Distillers Corporation.	
Bert, Philip R.....	Denver, Colo.	District Sales Manager, The American Distilling Company.	
Bakke, Gerald E.....	Denver, Colo.		Director, Package Association.
Boxer, Samuel G.....	Denver, Colo.		Director, Package Association.
Buchan, William K.....	Lakewood, Colorado.		Manager and Ex-Executive Vice-President, Wholesale Association.
Cohn, Harry O.....	Denver, Colo.		Ex-Secretary, Package Association.
Corgan, Bert C.....	Denver, Colo.		Vice-President, Package Association.
Eber, Isadore E.....	Denver, Colo.		President, Package Association.
Lewkowitz, Earl B.....	Denver, Colo.		Treasurer, Package Association.
Lutz, John	Pueblo, Colo.		Ex-Director, Package Association.

Name of individual	Residence	Business affiliation	Organization affiliation
Pringle, Abraham J.....	Denver, Colo.		Director, Package Association.
Rudolph, Jack J.....	Denver, Colo.		Director, Package Association.
Sackowitz, Jacob	Denver, Colo.		Ex-Director, Package Association.
Singer, Harry A.....	Denver, Colo.		Ex-Director, Package Association.
Singer, Samuel D.....	Denver, Colo.		Director, Package Association.
Speegle, J. E.....	Denver, Colo.		Ex-Director, Package Association.
Stein, William E.....	Denver, Colo.		Ex-Treasurer, Package Association.
Weinstock, Isadore J....	Denver, Colo.		Director, Package Association.
Wernet, Edmund	Denver, Colo.		Ex-Vice-President, Package Association.
Wolfson, Benjamin H....	Denver, Colo.		Secretary, Package Association.
Lewin, Morton J.....	Denver, Colo.	Secretary, Reuler - Lewin, Inc.	
Kendrick, R. G.....	Santa Barbara, California.	Former Regional Sales Manager, Hiram Walker, Incorporated, San Francisco.	
Works, Lyle A.....	Denver, Colo.	Vice-President, McKesson & Robbins, Incorporated.	Ex-Secretary and Director, Wholesale Association.
Tarble, N. E.....	Detroit, Michigan.	General Sales Manager and President, Jas. Barclay & Co., Limited.	
Sturman, E. N.....	Grosse Pte. Park, Michigan.	General Sales Manager and President, Hiram Walker Incorporated.	
Gross, Boone	Grosse Pte. Park, Michigan.	General Sales Manager and President, Gooderham & Worts, Limited.	
Hirsch, Otto E.....	Kansas City, Missouri.	President, Waterfill & Frazier Distillery Company.	
Kirk, Charles E.....	Denver, Colo.		Director, Package Association.

15. The defendant corporations named in paragraph 13 together with defendants Abraham Rothberg and Joseph Zerobnick are sometimes hereinafter referred to as "defendant wholesalers." The defendants designated in paragraph 14 as being, or as having been, officers and directors of defendant Package Association are sometimes hereinafter referred to as "defendant retailers."

16. During all times hereinafter mentioned some of the corporate defendants named herein have wholly owned or controlled subsidiaries through which a portion of their

business is transacted, and wherever in this indictment reference is made to any act or transaction on the part of any one of the said corporate defendants, it shall be deemed to include such act or transaction when performed by any of said subsidiaries.

100 17. Whenever it is hereinafter alleged in this indictment that any defendant association did any act or thing, such allegations shall be deemed to mean that each of the individuals and corporations named herein as defendants and described as officers, members, agents, or employees of the said defendant association authorized, ordered, or did such act or thing; and whenever it is hereinafter alleged that any defendant corporation (other than defendant associations) did any act or thing, such allegation shall be deemed to mean that each of the said individuals named herein as defendants and described as officers, agents, or employees of the said defendant corporation authorized, ordered, or did such act or thing.

IV. Nature of Trade and Commerce Involved.

18. Alcoholic beverages are marketed in the State of Colorado by means of a continuous flow of shipments from producers located outside the State of Colorado, through wholesalers and retailers, to the consuming public. Under the laws of the State of Colorado, alcoholic beverages shipped and sold in bottles by producers thereof may be sold to retailers in the State of Colorado only by wholesalers licensed as such under the laws of Colorado. Thus, wholesalers and retailers are the conduit through which alcoholic beverages shipped from States of the United States other than the State of Colorado are sold and distributed to the consuming public within the State of Colorado.

19. Until in or about 1940 small quantities of spirituous liquor produced in states of the United States other than the State of Colorado were shipped into the
101 State of Colorado in bulk, bottled in said State, and sold to the consuming public through the medium of wholesalers and retailers. At all times substantial quantities of wines produced in states of the United States other than the State of Colorado are shipped into the State of Colorado in bulk, bottled in said State, and sold and distributed to the consuming public through the medium of wholesalers and retailers.

20. More than 98% of all spirituous liquor consumed within the State of Colorado is produced outside the State of Colorado and shipped therefrom into the State of Colorado for sale and distribution to the consuming public through the medium of wholesalers and retailers. The total quantity of the spirituous liquors thus shipped into and sold and distributed within the State of Colorado approximates 1,150,000 gallons annually. More than 80% of all wines consumed within the State of Colorado is produced outside the State of Colorado and shipped therefrom into the State of Colorado for sale and distribution to the consuming public through the medium of wholesalers and retailers. The total quantity of the wines thus shipped into and sold and distributed within the State of Colorado approximates 800,000 gallons annually. Substantial amounts of beer consumed within the State of Colorado are produced in states other than the State of Colorado and shipped therefrom into the State of Colorado for sale and distribution to the consuming public through the medium of wholesalers and retailers.

102 21. Alcoholic beverages are distributed to the more than 700 retailers doing business in the State of Colorado by approximately 28 wholesalers. More than 75% of the spirituous liquors and wines, and substantial quantities of the beer, sold and distributed at wholesale in the State of Colorado, are sold and distributed by the defendant wholesalers. All of the spirituous liquor and wines, and substantial quantities of the beer, sold and distributed by the bottle or case to the consuming public in the State of Colorado are sold and distributed by retailers, including defendant retailers and other members of defendant Package Association.

V. The Conspiracy.

22. The Grand Jurors aforesaid, upon their oaths aforesaid, inquiring as aforesaid, do further find, present, and charge that all of the defendants herein, and other persons to the Grand Jurors unknown, well knowing all the facts alleged in this indictment, beginning in or about the month of June 1935, the exact date being to the Grand Jurors unknown, and continuously thereafter up to and including the date of the presentation of this indictment, knowingly have entered into and engaged in a combination and conspiracy to raise, fix, and maintain the wholesale prices of spirituous liquor and wines shipped into the

State of Colorado from producers located outside the State of Colorado by raising, fixing, and stabilizing wholesale mark-ups and margins of profit on such liquor and wines, which combination and conspiracy has been and is now in restraint of the hereinbefore described trade 103 and commerce in spirituous liquor and wines among the several states and in violation of Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies" (U. S. C. A., Title 15, Section 1), commonly known as the Sherman Act and which combination and conspiracy is now described in further detail, that is to say:

23. It is and has been a part of said combination and conspiracy:

(a) That the defendants from time to time discuss, agree upon, and adopt high, arbitrary, and noncompetitive wholesale prices, mark-ups, and margins of profit and arbitrary and noncompetitive discounts.

(b) That beginning in 1937 and continuing thereafter up to and including the date of this indictment the defendant wholesalers and other members of defendant Wholesale Association and defendant retailers agree upon and undertake a program, in part through the defendant associations, to persuade, induce, and compel producers, including defendant producers, to enter into producer-wholesaler fair trade contracts affecting the various brands of spirituous liquor and wines shipped by said producers into the State of Colorado, and to establish in and by said contracts high, arbitrary, and artificial wholesale prices embodying the arbitrary and noncompetitive mark-ups, margins of profit, and discounts agreed upon as aforesaid.

(c) That as a part of the program agreed upon and undertaken as aforesaid to persuade, induce, and com- 104 pel producers to enter into such producer-wholesaler fair trade contracts, the defendant Wholesale Association prepare and adopt forms of such fair trade contracts acceptable to the defendant wholesalers and to the other members of the defendant Wholesale Association; that defendant Wholesale Association agree with producers, including some of the defendant producers, upon the forms of fair trade contracts to be issued by said producers; that the defendant Wholesale Association prepare and circulate among its members bulletins and notices announcing the adoption of producer-wholesaler fair trade contracts, and

listing the names of all producers entering into producer-wholesaler fair trade contracts and of all producers not entering into such contracts.

(d) That, in connection with revisions in the wholesale prices established in and by the said fair trade contracts, the defendant wholesalers, acting through defendant Wholesale Association, from time to time advise and agree with producers, including defendant producers, as to such revisions so as to preserve and maintain the arbitrary and noncompetitive wholesale mark-ups, margins of profit, and discounts agreed upon as aforesaid.

(e) That the defendant wholesalers and the other members of the defendant Wholesale Association agree among themselves and with defendant producers and defendant retailers to sell, and sell, spirituous liquor and wines covered by the said producer-wholesaler fair trade contracts at wholesale prices, mark-ups, and margins of profit not lower, and at wholesale discounts not higher, than those established in said contracts; that the 105 defendant wholesalers agree among themselves and with the defendant producers that wholesalers selling spirituous liquor and wines at prices, mark-ups, and margins of profit lower, and at wholesale discounts higher, than those established in said fair trade contracts be deprived of the opportunity to purchase such spirituous liquor and wines from defendant producers.

(f) That in order further to discourage and prevent sales by wholesalers at prices, mark-ups, and margins of profit lower, and discounts higher, than the prices, mark-ups, and margins of profit agreed upon as aforesaid, defendant wholesalers, acting through defendant Wholesale Association, discuss and agree upon so-called "costs of doing business" as a wholesaler reflecting said agreed-upon prices, mark-ups, and margins of profit; and that defendant wholesalers, acting through defendant Wholesale Association, thereafter institute and prosecute legal proceedings ostensibly to obtain judicial determination of the costs of doing business as a wholesaler, but actually for the purpose of securing legal sanction for said agreed-upon "costs of doing business," as aforesaid, by presenting to the Court only facts tending to support said agreed-upon "costs of doing business" and withholding from the Court, and suppressing facts tending to establish costs of doing business lower than said agreed-upon "costs of doing business" as aforesaid.

(g) That the defendants, acting in part through defendant associations, agree to and do police the high, arbitrary, and noncompetitive wholesale mark-ups and margins of profit, the high, arbitrary, and artificial wholesale prices, the high, arbitrary, and noncompetitive wholesale discounts agreed upon as aforesaid, and agree to and do require and enforce observance thereof; that defendant Wholesale Association employ paid executives and investigators to spy upon and harass wholesalers who fail or refuse to observe said wholesale prices, mark-ups, margins of profit, and discounts; that defendant Wholesale Association threaten to institute, and in fact institute or cause to be instituted, legal proceedings against wholesalers who fail or refuse to observe said wholesale prices, mark-ups, margins of profit, and discounts; that to finance the aforesaid activities the defendants, beginning in or about July 1936 and continuing up until the date of this indictment, agree upon and provide for the collection of an extra charge added to the wholesale prices, the proceeds thereof to be paid to defendant Wholesale Association, and that defendant Wholesale Association in turn from time to time pay to defendant Package Association a portion of said proceeds.

(h) That such fair trade agreements as aforesaid be made, agreed upon, and carried out in a manner and for purposes not contemplated by the Miller-Tydings Amendment to the Sherman Act (Act of Congress, August 17, 1937; 50 Stat. 693) or the Colorado Fair Trade Act (Vol. 4, Sec. 20(1)-20(5), C. 165, 1937 Colorado Statutes Annotated).

24. For the purpose of effectuating the aforesaid combination and conspiracy the defendants have regularly and continuously entered into those agreements and done those things which they combined and conspired to do as hereinbefore alleged.

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VI. Effect of the Conspiracy.

25. The effect of the combination and conspiracy hereinbefore alleged is and has been (a) to raise, fix, stabilize, and maintain the wholesale prices of spirituous liquor and wines shipped in interstate commerce into the State of Colorado and sold and distributed therein, at levels acceptable to and approved by the defendants; (b) to eliminate price competition among the defendant wholesalers in the

sale and distribution of spirituous liquor and wines shipped in interstate commerce into the State of Colorado; (c) to eliminate price competition between defendant wholesalers and the other members of defendant Wholesale Association in the sale and distribution of spirituous liquor and wines shipped in interstate commerce into the State of Colorado; (d) to restrain and suppress interstate trade and commerce in spirituous liquor and wines not covered by producer-wholesaler fair trade contracts.

26. It has never been and is not now the purpose, intent, or effect of said combination and conspiracy to promote the purpose of the Miller-Tydings Act (Act of Congress, August 17, 1937; 50 Stat. 693) and the Colorado Fair Trade Act (Vol. 4, Sec. 20(1)-20(5), C. 165, 1937 Colorado Statutes annotated), or to establish wholesale prices on spirituous liquor and wines for the protection of the goodwill in the trademarks, brands, or names of the producers or wholesalers producing or distributing such spirituous liquor and wine.

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VII. Jurisdiction and Venue.

27. The combination and conspiracy herein alleged has been entered into and carried out in part within the District of Colorado. During the period of said conspiracy and within three years next preceding the presentation of this indictment, the defendants have performed within the District of Colorado many of the acts and things set forth in paragraph 23 hereof.

28. And so the Grand Jurors aforesaid, upon their oaths aforesaid, do find and present that the defendants throughout the period aforesaid, at the places and in the manner aforesaid, unlawfully have engaged in a continuing combination and conspiracy in restraint of the aforesaid trade and commerce in spirituous liquor and wines among the several states of the United States, contrary to the form of the statute of the United States of America in such case made and provided, and against the peace and dignity of the United States.

Count Two.

And the Grand Jurors aforesaid, upon their oaths aforesaid, inquiring as aforesaid, do hereby reaffirm, reallege, and incorporate as if herein set forth in full, each of the allegations set forth in paragraphs 2 to 21, inclusive, contained in Count One of this indictment.

I. Period of Time Covered by This Count.

29. Each of the allegations hereinafter contained in this count shall be deemed to refer to the period of time beginning in or about January 1936, the exact date being to the Grand Jurors unknown, and continuing thereafter up to and including the date of the presentation of this indictment, unless otherwise expressly stated.

II. The Conspiracy.

30. The Grand Jurors aforesaid, upon their oaths aforesaid, inquiring as aforesaid, do further find, present, and charge that all of the defendants herein and other persons to the Grand Jurors unknown, well knowing all the facts alleged in this indictment, beginning in or about January 1936, the exact date being to the Grand Jurors unknown, and continuously thereafter up to and including the date of the presentation of this indictment, knowingly have entered into and engaged in a combination and conspiracy to raise, fix, and maintain the retail prices of alcoholic beverages shipped into the State of Colorado from producers located outside the State of Colorado by raising, fixing, and stabilizing retail mark-ups and margins of profit on such alcoholic beverages, which combination and conspiracy has been and is now in restraint of the heretofore described trade and commerce in alcoholic beverages among the several states and in violation of Section 1 of the Act of Congress of July, 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies" (U. S. C. A. Title 15, Section 1), commonly known as the Sherman Act, and which combination and conspiracy is now described in further detail, that is to say:

31. It is and has been a part of said combination and conspiracy:

110 (a) That the defendants from time to time discuss, agree upon, and adopt high, arbitrary, and noncompetitive retail prices, mark-ups, and margins of profit.

(b) That beginning in 1937 and continuing thereafter up to and including date of this indictment, defendant retailers and defendant wholesalers and other members of defendant associations agree upon and undertake a program, in part through defendant associations, to persuade, induce, and compel producers, including defendant pro-

ducers, and wholesalers, to enter into fair trade contracts affecting every type and brand of alcoholic beverages shipped into the State of Colorado and to establish in and by said contracts high, arbitrary, and artificial retail prices embodying the high, arbitrary, and noncompetitive retail mark-ups and margins of profit agreed upon as aforesaid.

(c) That as a part of the program agreed upon and undertaken as aforesaid to persuade, induce, and compel producers and wholesalers to enter into such fair trade contracts, the defendant Package Association prepare and adopt forms of fair trade contracts acceptable to the defendant retailers and to the other members of the defendant Package Association; that defendant Package Association agree with producers and wholesalers, including some of the defendant producers and defendant wholesalers, upon the forms of fair trade contracts to be used by said producers and wholesalers.

(d) That the defendant Package Association prepare and circulate among its members bulletins and notices announcing the adoption of fair trade contracts and listing the names of producers and wholesalers entering into fair trade contracts and of all producers and wholesalers not entering into such contracts; that defendant retailers, through defendant Package Association, agree to and do patronize only those producers and wholesalers, including defendant producers and defendant wholesalers, who enter into fair trade contracts embodying said retail prices, mark-ups, and margins of profit, and who require and compel observance of the minimum retail prices established in and by said fair trade contracts; that defendant retailers, through defendant Package Association, agree to and do withhold their patronage from producers and wholesalers who fail or refuse to enter into such fair trade contracts embodying such retail prices, mark-ups, and margins of profit.

(e) That, in connection with revisions in the retail prices established in and by the said fair trade contracts, the defendant retailers, acting through defendant Package Association, from time to time advise and agree with producers and wholesalers, including defendant producers and defendant wholesalers, as to such revisions so as to preserve and maintain the retail mark-ups and margins of profit agreed upon as aforesaid.

(f) That the defendants, acting in part through de-

defendant associations, agree to and do police the high, arbitrary, and noncompetitive retail prices, mark-ups, and margins of profit agreed upon as aforesaid, and require and secure observance thereof; that defendant associations employ paid executive and investigators to spy 112 upon and harass retailers who fail or refuse to observe said retail prices, mark-ups, and margins of profit; that defendant associations threaten to institute and in fact institute or cause to be instituted legal proceedings against retailers who fail or refuse to observe said retail prices, mark-ups, and margins of profit; that the defendant retailers agree among themselves and with the defendant producers and the defendant wholesalers, that retailers selling alcoholic beverages at prices, mark-ups, and margins of profit lower than those established in said fair trade contracts be deprived of the opportunity to purchase such alcoholic beverages from defendant producers and defendant wholesalers; that defendant retailers threaten to boycott and in fact boycott wholesalers and producers who supply their products to retailers failing or refusing to observe said retail prices, mark-ups, and margins of profit; that to finance the aforesaid activities the defendants, beginning in or about July 1936 and continuing up until the date of this indictment, agree upon and provide for the collection of an extra charge added to the wholesale price; the proceeds thereof to be paid to defendant Wholesale Association, and that defendant Wholesale Association in turn from time to time pay to defendant Package Association a portion of said proceeds.

(g) That, in disregard of the Colorado Fair Trade Act (Vol. 4, Sec. 20 (1)—20 (5), C. 165, 1937 Colorado Statutes Annotated) and in order to maintain the retail prices, mark-ups, and margins of profit agreed upon and policed as aforesaid, the defendants agree to and do discourage 113 age and prevent sales of merchandise being or to be closed out by the owner thereof at retail prices lower than those established in and by said fair trade contracts.

(h) That in order to reduce price competition among retailers, defendant retailers, acting in part through defendant Package Association, agree and attempt to persuade and induce that authorized officials of the State of Colorado and the City and County of Denver, Colorado, to reject applications for retail liquor licenses.

(i) That such fair trade agreements as aforesaid be made, agreed upon, and carried out in a manner and for

purposes not contemplated by the Miller-Tydings Amendment to the Sherman Act (Act of Congress, August 17, 1937; 50 Stat. 693) or the Colorado Fair Trade Act (Vol. 4, Sec. 20 (1)—20 (5), C. 165, 1937 Colorado Statutes Annotated):

32. For the purpose of effectuating the aforesaid combination and conspiracy the defendants have regularly and continuously entered into those agreements and done those things which they combined and conspired to do as hereinbefore alleged.

III. Effect of the Conspiracy.

33. The effect of the combination and conspiracy hereinbefore alleged is and has been (a) to raise, fix, stabilize, and maintain the retail prices of alcoholic beverages shipped in interstate commerce into the State of Colorado and sold and distributed therein, at levels acceptable to and approved by the defendants; (b) to eliminate price competition among the defendant retailers in the sale and distribution of alcoholic beverages shipped in interstate commerce into the State of Colorado; (c) to eliminate price competition among the members of the defendant Package Association in the sale and distribution of alcoholic beverages shipped in interstate commerce into the State of Colorado; (d) to restrain and suppress interstate trade and commerce in alcoholic beverages not covered by fair trade contracts.

34. It has never been and is not now the purpose, intent, or effect of said combination and conspiracy to promote the purposes of the Miller-Tydings Act (Act of Congress, August 17, 1937; 50 Stat. 693) and the Colorado Fair Trade Act (Vol. 4, Sec. 20 (1)—20 (5), C. 165, 1937 Colorado Statutes Annotated), or to establish retail prices on alcoholic beverages for the protection of the goodwill in the trademarks, brands, or names of the producers or wholesalers producing or distributing said alcoholic beverages.

IV. Jurisdiction and Venue.

35. The combination and conspiracy herein alleged has been entered into and carried out in part within the District of Colorado. During the period of said conspiracy and within three years next preceding the presentation of this indictment, the defendants have performed within the

District of Colorado many of the acts and things set forth in paragraph 31 hereof.

36. And so the Grand Jurors aforesaid, upon their oaths aforesaid, do find and present that the defendants throughout the period aforesaid, at the places and in the manner aforesaid, unlawfully have engaged in a continuing combination and conspiracy in restraint of the aforesaid trade and commerce in alcoholic beverages among the several states of the United States, contrary to the form of the statute of the United States of America in such case made and provided, and against the peace and dignity of the United States.

A true bill:

Walter Kley,
Foreman.

James McL. Henderson,
John W. Porter,
Special Assistants to the Attorney General,

James R. Browning,
Donald W. Marshall,
Stephen L. R. McNichols,
Special Attorneys.

Thurman Arnold,
Assistant Attorney General.

Thomas J. Morrissey,
United States Attorney.

A True Copy, Teste:

G. Walter Bowman,
Clerk.
By William Graf,
Deputy Clerk.

(Seal)

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DEFENDANTS' EXHIBIT NO. 24.

PLEAS IN THE UNITED STATES DISTRICT COURT

For the District of Colorado,

Sitting at Denver.

Twelfth Day, May Term, Monday, May 14th, A. D. 1945.

Present: The Honorable J. Foster Symes, District Judge, and other officers as noted on the first day of May, A. D. 1945.

The United States of America }
9514 vs. } Judgment.
Calvert-Distillers Corporation. }

At this day comes Thomas J. Morrissey, Esquire, District Attorney, and George B. Haddock, Esquire, and Gerald E. McAuliffe, Esquire, special prosecutors of the above entitled case and W. W. Grant, Esquire, with Power of Attorney for the defendant Calvert-Distillers Corporation, also come.

And thereupon, the defendant, Calvert-Distillers Corporation, by W. W. Grant, Esquire, its attorney, withdraws its former plea of not guilty as to count two of the indictment herein, and presents to the court now here its plea of non vult contendere as to count two and prays the court to pass sentence upon it in all things as if it had pleaded guilty to the indictment herein. And the consequences and effects thereof being now here fully explained it still persists therein.

Wherefore, it is considered and adjudged by the court upon the plea of non vult contendere that the defendant, Calvert-Distillers Corporation, is guilty of a conspiracy to violate the Sherman Act and for having committed the crime aforesaid is by the court sentenced to pay to 117 the United States of America a fine of Two Thousand Five Hundred Dollars (\$2,500.00), and that the United States have execution therefor.

Thereupon, it is ordered by the court that the defendant have day and to and including one (1) day from this day within which to pay said fine, and the bond heretofore given by the said defendant shall continue in force and effect until the said fine shall have been paid.

The United States of America,
9514 *vs.* } Judgment.
Victor A. Fischel.

At this day comes Thomas J. Morrissey, Esquire, District Attorney, and George B. Haddock, Esquire, and Gerald E. McAuliffe, Esquire, special prosecutors of the above entitled case and W. W. Grant, Esquire, with Power of Attorney for the defendant, Victor A. Fischel, also come.

And thereupon, the defendant, Victor A. Fischel, by W. W. Grant, Esquire, his attorney, withdraws his former plea of not guilty as to count two of the indictment herein, and presents to the court now here his plea of non vult contendere as to count two and prays the court to pass sentence upon him in all things as if he had pleaded guilty to the indictment herein. And the consequences and 118 effects thereof being now here fully explained, he still persists therein.

Wherefore, it is considered and adjudged by the court upon the plea of non vult contendere that the defendant, Victor A. Fischel, is guilty of a conspiracy to violate the Sherman Act and for having committed the crime aforesaid is by the court sentenced to pay to the United States of America a fine of One Thousand Five Hundred Dollars (\$1,500.00), and that the United States have execution therefor.

Thereupon, it is ordered by the court that the defendant have day and to and including one (1) day from this day within which to pay said fine, and the bond heretofore given by the said defendant shall continue in force and effect until the said fine shall have been paid.

119 The United States of America }
9514 *vs.* } Judgment.
Arthur L. Franzen.

At this day comes Thomas J. Morrissey, Esquire, District Attorney, and George B. Haddock, Esquire, and Gerald E. McAuliffe, Esquire, special prosecutors of the above entitled case and the defendant in his own proper person and by W. W. Grant, Esquire, his attorney, also come.

And thereupon the defendant, Arthur L. Franzen, withdraws his former plea of not guilty as to count two of the indictment herein, and presents to the court now here

his plea of non vult contendere as to count two and prays the court to pass sentence upon him in all things as if he had pleaded guilty to the indictment herein. And the consequences and effects thereof being now here fully explained he still persists therein.

Wherefore, it is considered and adjudged by the court upon the plea of non vult contendere that the defendant, Arthur L. Franzen, is guilty of a conspiracy to violate the Sherman Act and for having committed the crime aforesaid is by the court sentenced to pay to the United States of America a fine of Two Thousand Five Hundred Dollars (\$2,500.00), and that the United States have execution therefor.

Thereupon, it is ordered by the court that the defendant have day and to and including one (1) day from this day within which to pay said fine, and the bond heretofore given by the said defendant shall continue in force and effect until the said fine shall have been paid.

120 The United States of America	} Judgment.
9514 vs.	
Max Sobel.	

At this day comes Thomas J. Morrissey, Esquire, District Attorney, and George G. Haddock, Esquire, and Gerald E. McAuliffe, Esquire, special prosecutors of the above entitled case and W. W. Grant, Esquire, with Power of Attorney for the defendant, Max Sobel, also come.

And thereupon, the defendant, Max Sobel, by W. W. Grant, Esquire, his attorney, withdraws his former plea of not guilty as to count two of the indictment herein, and presents to the court now here his plea of non vult contendere as to count two and prays the court to pass sentence upon him in all things as if he had pleaded guilty to the indictment herein. And the consequences and effects thereof being now here fully explained he still persists therein.

Wherefore, it is considered and adjudged by the court upon the plea of non vult contendere that the defendant, Max Sobel, is guilty of a conspiracy to violate the Sherman Act and for having committed the crime aforesaid is by the court sentenced to pay to the United States of America a fine of Two Thousand Dollars (\$2000.00), and that the United States have execution therefor.

Thereupon, it is ordered by the court that the defendant have day and to and including one (1) day from this day within which to pay said fine, and the bond heretofore given by the said defendant shall continue in force and effect until the said fine shall have been paid.

121 The United States of America	} Judgment
9514 vs.	
Angelo Distasi.	

At this day comes Thomas J. Morrissey, Esquire, District Attorney, and George B. Haddock, Esquire, and Gerald E. McAuliffe, Esquire, special prosecutors of the above entitled case and the defendant in his own proper person and by W. W. Grant, Esquire, his attorney, also come.

And thereupon, the defendant, Angelo Distasi, withdraws his former plea of not guilty as to count two of the indictment herein, and presents to the court now here his plea of non vult contendere as to count two and prays the court to pass sentence upon him in all things as if he had pleaded guilty to the indictment herein. And the consequences and effects thereof being now here fully explained he still persists therein.

Wherefore, it is considered and adjudged by the court upon the plea of non vult contendere that the defendant, Angelo Distasi, is guilty of a conspiracy to violate the Sherman Act and for having committed the crime aforesaid is by the court sentenced to pay to the United States of America a fine of Two Thousand Dollars (\$2000.00), and that the United States have execution therefor.

Thereupon, it is ordered by the court that the defendant have day and to and including one (1) day from this day within which to pay said fine, and the bond heretofore given by the said defendant shall continue in force and effect until the said fine shall have been paid.

122 Sixty-Seventh Day, May Term, Wednesday,

July 28th, A. D. 1943.

Present: The Honorable J. Foster Symes, District Judge, and other officers as noted on the fourth day of May, A. D. 1943.

The United States of America	} Judgment.
9514 vs.	
Seagram-Distillers Corporation.	

At this day comes Thomas J. Morrissey, Esquire, District Attorney, and James McL. Henderson, Esquire, Special Assistant to the Attorney General, who prosecutes the above entitled case and the defendant, Seagram Distillers Corporation, by Arthur L. Franzen, its designated officer and by W. W. Grant, Esquire, its attorney, also comes.

And thereupon, the defendant, Seagram-Distillers Corporation, by its designated officer now withdraws its former plea of not guilty to the second count of the indictment herein, and presents to the court now here its plea of nolo contendere and prays the court to pass sentence upon it in all things as if it had pleaded guilty to the indictment herein. And the consequences and effects thereof being now here fully explained it still persists therein.

Wherefore, it is considered and adjudged by the court upon the plea of nolo contendere that the defendant, Seagram-Distillers Corporation, is guilty of a conspiracy to violate the Sherman Act and for having committed the crime aforesaid is by the court sentenced to pay to the United States of America a fine of Thirty-Five Hundred Dollars (\$3500.00), and that the United States have execution therefor.

Thereupon, it is ordered by the court that the defendant have to and including the fourth day of August, A. D. 1943, within which to pay said fine.

123 One Hundred Fifth Day, November Term,
Monday, April 23rd, A. D. 1945.

Present: The Honorable J. Foster Symes, District Judge and other officers as noted on the eighth day of November, A. D. 1944.

The United States of America	}	Mandate of United States Supreme Court.
9514 vs.		
Seagram-Distillers Corporation.		

A mandate from the Supreme Court of the United States having been filed herein this day, in the above entitled case, it is ordered by the court that the said mandate be spread upon the records of this court, which is accordingly done in the words and figures as follows, to wit:

Endorsed: 9514 Criminal. Filed United States District Court Denver, Colorado Apr 23 1945. G. Walter Bowman, Clerk.

United States }
of America. } ss:

The President of the United States of America To the Honorable the Judges of the District Court of the United States for the District of Colorado

(Seal of the Supreme Court of the United States)

Greeting:

Whereas, lately in the United States Circuit Court of Appeals for the Tenth Circuit, in a cause between Seagram-Distillers Corporation, Appellant, and The United States of America, Appellee, No. 2797, wherein the judgment of the said Circuit Court of Appeals, entered in said 124 cause on the 26th day of August, A. D. 1944, is in the following words, viz:

"This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Colorado and was argued by counsel.

"On consideration whereof, it is now here ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby reversed; and that this cause be and the same is hereby remanded to the said district court with directions to dismiss the indictment as to appellant."

as by the inspection of the transcript of the record of the said United States Circuit Court of Appeals was brought into the Supreme Court of the United States by virtue of a writ of certiorari, agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And Whereas, in the present term of October, in the year of our Lord one thousand nine hundred and forty-four, the said cause came on to be heard before the said Supreme Court, on the said transcript of record and was argued by counsel:

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said United States Circuit Court of Appeals in this cause be, and the same is hereby reversed and the judgment of the District Court is affirmed.

And It Is Further Ordered, That this cause be, and the same is hereby, remanded to the District Court of the United States for the District of Colorado.

March 5, 1945.

125 You, therefore, are hereby commanded that such proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said writ of certiorari notwithstanding.

Witness, the Honorable Harlan F. Stone, Chief Justice of the United States, the twenty-first day of April, in the year of our Lord one thousand nine hundred and forty-five.

Charles Elmore Cropley,
*Clerk of the Supreme Court
of the United States.*

126 United States of America, } ss:
 District of Colorado.

I, G. Walter Bowman, Clerk of the United States District Court in and for the District of Colorado, do hereby certify that the annexed and foregoing is a true and full copy of the original Judgment as to Calvert-Distillers Corporation; Judgment as to Victor A. Fischel; Judgment as to Arthur L. Franzen; Judgment as to Max Sobel; and Judgment as to Angelo Distasi, all of which were filed and entered on the docket on May 14, 1945; Judgment as to Seagram-Distillers Corporation, which was filed and entered on the docket on July 28, 1943; and the Mandate of The Supreme Court of the United States, which was filed and entered on the docket on April 23, 1945; all in a case lately pending in said court wherein The United States of America was plaintiff and Colorado Wholesale Wine and Liquor Dealers Association, Inc., and others were defendants, Criminal No. 9514, now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Denver, Colorado, this 17th day of May, A. D. 1949.

(Seal)

G. Walter Bowman,
 Clerk.

By Lucille T. Stewart,
 Deputy Clerk.

127 And afterwards towit: at the May Term of said Court, on the 23rd day of May, 1949, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein towit:

Come again the parties by their respective attorneys, and the jury heretofore impaneled and sworn also comes, and the trial of this cause is now resumed. The argument of counsel being heard, the jury is now instructed by the Court and retires to deliberate in charge of a bailiff who is duly sworn.

128 The following is a copy of the plaintiff's request for instructions with the plaintiff's requested instructions attached thereto as designated in the defendants' designation of record.

129 IN THE DISTRICT COURT OF THE UNITED STATES.

• • (Caption—1524) • •

PLAINTIFF'S REQUEST FOR INSTRUCTIONS TO JURY.

Comes now Kiefer-Stewart Company, plaintiff in the above-entitled cause, and requests the Court to give to the jury the following instructions numbered 1 to 14, inclusive, and each of them.

Dated May 23, 1949.

Baker & Daniels,
By (Signed) Joseph J. Daniels,
Attorneys for Plaintiff.

130 Plaintiff's Requested Instruction No. 1.

If you find from a fair preponderance of the evidence that the defendants combined and conspired to put an end to the interstate commerce of plaintiff in the purchase by plaintiff and sale by defendants of Seagram and Calvert liquors, then you shall find that the defendants have violated Section 1 of the Sherman Antitrust Act.

Plaintiff's Requested Instruction No. 2.

If you find from a fair preponderance of the evidence that the defendants combined and conspired together to fix the resale price of Seagram and Calvert liquors sold in interstate commerce to Indiana wholesalers, when resold by such wholesalers, then you shall find that the defendants have violated Section 1 of the Sherman Antitrust Act.

Plaintiff's Requested Instruction No. 3.

A combination or conspiracy by producers to fix resale prices of goods shipped in interstate commerce is a violation of Section 1 of the Sherman Antitrust Act whether the combination or conspiracy be for the purpose of raising, lowering, pegging or stabilizing the resale price of such goods or for whatever purpose the same may be.

Plaintiff's Requested Instruction No. 4.

I further instruct you that a producer of goods shipped in interstate commerce, acting alone, has a perfect right under the law to sell or not to sell his goods to any person. A producer of goods may also suggest or recommend the resale prices to be charged by his customers. However, such producer may not coerce his customers by withholding his goods, or otherwise, to charge or agree to charge the resale prices prescribed by such producer; and if such producer coerces his customers into such unlawful contract, combination or conspiracy, the action so taken by him constitutes a violation of the Sherman Act. So in this case, if you find from a fair preponderance of the evidence that the acts of any one of the defendants were intended to and did coerce Indiana wholesalers, including plaintiff, to charge or to agree to charge the resale prices prescribed by such defendant, then you shall find that such defendant has by such conduct violated the Sherman Act even though you find that such defendant did not conspire or combine with any other defendant.

Plaintiff's Requested Instruction No. 5.

If you find a contract, combination or conspiracy between two or more of the defendants in violation of Section 1 of the Sherman Antitrust Law, then the fact that you also find that such defendants are closely affiliated rather than independent is immaterial. In other words the corporate interrelationships of the conspirators does not immunize the unlawful conspiracy, contract or combination so found.

Plaintiff's Requested Instruction No. 6.

The term "restraint of trade," as used in the Sherman Act, does not include every restraint of interstate trade. Only those restraints which are deemed to be unreasonable are within the prohibition of the law. By this statement, however, I do not mean to instruct you that it is for you to decide whether each of the restraints alleged are reasonable and unreasonable. There are certain types of restraints which are deemed to be unreasonable in and of themselves and the motive or purpose of the defendants, however commendable they may seem to them to

be, are immaterial and to be disregarded in determining whether this section of the Sherman Antitrust Law has been violated. Among such restraints which are deemed to be unreasonable without regard to the motive are contracts, combinations or conspiracies to fix the price or resale price of goods. Such combinations or conspiracies constitute unreasonable restraints whether for the purpose of raising, lowering, pegging or stabilizing the resale price of goods sold in interstate commerce. This rule is founded upon the basic premise of the Antitrust laws that a free market should prevail regulated only by competition or government regulation. It is therefore the law that any combination which tampers with price structures is engaged in an unlawful activity.

Plaintiff's Requested Instruction No. 7.

The terms "contract, combination or conspiracy" as used in Section 1 of the Sherman Act mean in essence a combination of two or more persons, by concerted action, to accomplish an unlawful purpose. In other words, the statute refers to an agreement, confederation, combination, design, scheme, plan or purpose of two or more parties to accomplish by their concerted actions or cooperation an unlawful result by either lawful or unlawful means.

Plaintiff's Requested Instruction No. 8.

In order to establish a conspiracy it is not necessary that there should be an explicit or formal agreement between parties, nor is it essential that direct and positive proof be made of an express agreement to do the act forbidden. In cases under Section 1 of the Sherman 133 Act it may be often impossible to produce such proof because conspiracies are not usually meditated and planned in the presence of witnesses not parties thereto, nor in terms of express language. Hence, a conspiracy may be proved by circumstances. The understanding, combination or agreement between the parties in a given case to effect by their concerted action a restraint on interstate commerce must be proved by a fair preponderance of the evidence, but circumstantial evidence may be resorted to to show such agreement or conspiracy. Conspiracies may be entered into in a very informal way; generally, in an

Plaintiff's Requested Instructions.

informal way, but if, by any means whatever, they have come to a mutual understanding for concerted action to accomplish an unlawful purpose or a lawful purpose by unlawful means, that is a conspiracy.

Plaintiff's Requested Instruction No. 9.

If you find from a fair preponderance of the evidence that the defendants or some of them have conducted themselves in such a way as under the law, upon which I have instructed you, constituted a violation of the Antitrust Laws, then you must determine from the evidence whether and to what extent, if any, the plaintiff has been injured in its business or property by reason of the conduct of the defendants so found to be unlawful.

Plaintiff's Requested Instruction No. 10.

In considering the evidence presented in this case bearing on the question of injury to the plaintiff you should bear in mind that it is undisputed that plaintiff did not receive any products of the Seagram or Calvert Companies from November 1, 1946 to the time of filing of the plaintiff's

Supplemental and Amended Complaint on May 17, 1949. It is for you to determine from a fair preponderance of the evidence whether or not this fact constituted injury to the plaintiff by reason of the conduct of the defendants, if any, found to be in violation of the Antitrust Laws, and if you so find, it is for you to determine from the evidence the extent of the damage, if any, to the plaintiff by reason of such injury.

Plaintiff's Requested Instruction No. 11.

The burden is upon the plaintiff to prove by a fair preponderance of the evidence both the fact of injury by reason of a violation or violations of the Antitrust laws and also the extent of its damage from such injury. You are not permitted to speculate on the damages, if any, suffered by the plaintiff but you are entitled to make a just and reasonable estimate of damage based on relevant data as shown by the evidence and the fact, if you so find, that the wrongful acts of the defendants have made impossible an absolutely direct and positive proof does not preclude you from acting on probable and inferential proof.

Plaintiff's Requested Instruction No. 12.

I instruct you that the mere shipment by the defendants of Seagram and Calvert products to wholesalers in the State of Indiana during the period when the 15% over-all markup was in force would not under any circumstances have constituted a violation of the Antitrust laws by the defendants.

135 Plaintiff's Requested Instruction No. 13.

I instruct you that under the law of the State of Indiana and the regulations of the Indiana Alcoholic Beverage Commission, manufacturers of alcoholic beverages may advertise alcoholic beverages by brand name or brand names in any newspaper or magazine which circulates generally to the public and which has a regular net paid subscription list. There is no requirement in such law or regulation that a manufacturer of alcoholic beverages must enter into a fair trade contract prior to advertising such brand name merchandise unless such manufacturer desires to include in such advertisements the price of its products.

Plaintiff's Requested Instruction No. 14.

The plaintiff in this action is not suing for breach of a contract with the defendants but under a statute of the United States for violation of the Antitrust Law. I therefore instruct you that, if you find for the plaintiff and find that the plaintiff has suffered damages by reason of defendants' violation of the Antitrust Laws, the fact that plaintiff had no firm contract for continuing as a distributor of any of the defendants' products does not affect the plaintiff's right of recovery in this action.

136 The following is a copy of the defendants' request for instructions with the defendants' requested instructions attached thereto as designated in the defendants' designation of record.

137 IN THE DISTRICT COURT OF THE UNITED STATES.
 • • (Caption—1524) • • •

DEFENDANTS' REQUEST FOR INSTRUCTIONS.

Come now the defendants in the above entitled cause by their attorneys before the commencement of the argument of the case, and each request the Court to give to the jury each of the following requested instructions numbered 1 to 11, inclusive.

White & Case,
 Davis, Baltzell, Hartsock & Dougus,
 By (Signed) Paul Y. Davis,
 Attorneys for Defendants.

138 Defendants' Requested Instruction No. 1.

The Court instructs you to return a verdict for the defendants, and each of them.

Defendants' Requested Instruction No. 2.

The action of the defendants, or any of them directed solely towards preventing an increase in the resale price of their products, was not a violation of the anti-trust laws of the United States, whether done singly or in combination with each other.

Defendants' Requested Instruction No. 3.

One of the charges made by the plaintiff in this case is that the acquisition of the stock of defendant Calvert Distilling Company by defendant Joseph E. Seagram & Sons, Inc., on or about April 9, 1945, restrained interstate commerce and trade in violation of Section 7 of the Clayton Act, one of the anti-trust laws of the United States. You are instructed that such stock acquisition did not constitute any violation of the anti-trust laws of the United States.

Defendant's Requested Instruction No. 4.

The Court instructs you that a combination, or conspiracy, to fix, raise and maintain uniform mark-ups of resale prices of goods shipped in interstate commerce is a violation of Section 1 of the Sherman Act and is illegal and unlawful.

139 Defendants' Requested Instruction No. 5.

If the jury believe that the plaintiff and other persons combined, conspired or agreed by concerted action to establish non-competitive prices upon intoxicating liquors to be shipped in interstate commerce into the State of Indiana and resold by plaintiff and other wholesalers of intoxicating liquors within the State of Indiana and that the refusal of the defendants, or any of them, to furnish merchandise to plaintiff was done to avoid becoming a party to such combination or conspiracy, then your verdict should be for the defendants.

Defendants' Requested Instruction No. 6.

In determining whether plaintiff and other wholesalers of intoxicating liquors in the State of Indiana entered into a conspiracy, or combination, to raise the wholesale price of liquors shipped into the State of Indiana in violation of the Sherman Act, it is not necessary for you to find that any such conspiracy, or combination, was formed with simultaneous action or by agreement. It is enough to establish such conspiracy, or combination, that plaintiff and other liquor wholesalers knew that concerted action was planned and invited, and that they gave adherence to the scheme and participated in it by filing uniform mark-ups of wholesale liquor prices with the Indiana Alcoholic Beverage Commission and by placing such increased prices in effect.

140 Defendants' Requested Instruction No. 7.

If you should find that plaintiff and other wholesalers of intoxicating liquors in the State of Indiana accepted, although without any previous agreement, an invitation to participate in a plan, the necessary effect of which was to fix and raise the wholesale price of intoxicating liquors

Defendants' Requested Instructions.

shipped in interstate commerce into the State of Indiana, such acceptance and concert of action by plaintiff and other wholesalers is sufficient to establish an unlawful conspiracy under the Sherman Act.

Defendants' Requested Instruction No. 8.

In order to show an unlawful combination or conspiracy within the Sherman Act, no express agreement need be shown under which concerted action is taken. Conspiracies need not be proved by direct testimony, and may be inferred from the things actually done, and if you should find that plaintiff and other Indiana liquor wholesalers by concerted action uniformly marked up their prices of intoxicating liquors shipped in interstate commerce to be sold in the State of Indiana, you may properly infer that they conspired to accomplish that which was the natural consequence of such action, and that they thereby participated in an illegal conspiracy condemned by the Sherman Act.

141 Defendants' Requested Instruction No. 9.

The evidence shows that representatives of plaintiff, and almost all other wholesale liquor dealers of Indiana, attended a meeting of the Indiana Wholesale Liquor Dealers Association at Indianapolis, Indiana, on October thirty-first, 1946, at which meeting plaintiff's representative announced plaintiff's intention to adopt and file an increased mark-up on its wholesale price of distilled spirits, and that beginning immediately following such meeting a great majority of such dealers, including plaintiff, filed with the Indiana Alcoholic Beverage Commission notices of intention to increase prices on distilled spirits by an identical mark-up formula, which price increases became effective simultaneously November 6, 1946. You have the right to infer from this almost simultaneous uniform action taken by plaintiff and other Indiana liquor wholesalers in raising their wholesale prices of intoxicating liquors shipped from other States that they entered into or formed an unlawful combination or conspiracy in violation of the Sherman Act, and if you so find, then defendants, if they were informed of such action, had a right to withhold their merchandise from plaintiff and other participants in such conspiracy, and should not be found guilty of violation of law for so doing.

142 Defendants' Requested Instruction No. 10.

The complaint does not charge, nor does the evidence show any purpose or intention on the part of the defendants or any of them to create or maintain a monopoly of any part of the interstate trade in alcoholic beverages, and in the absence of any such intent or purpose the anti-trust laws of the United States which the plaintiff claims were violated do not restrict the long recognized right of a trader or manufacturer engaged, as were these defendants, in an entirely private business, to deal with or refrain from dealing with any customer, actual or prospective. I instruct you, therefore, that none of the defendants can be held liable for refusing to sell or to resume selling their products to plaintiff, no matter what the motive for such refusal, unless you find that such refusal was part of an unlawful conspiracy in restraint of trade in interstate commerce.

Defendants' Requested Instruction No. 11.

There is no charge in the complaint, nor is there any evidence, that the defendants, or any of them, violated any law in entering into fair trade contracts with Indiana distributors of liquor in the year 1947 or in posting fair trade resale prices thereunder with the Alcoholic Beverage Commission of Indiana, and the fact that defendants did enter into such contracts and post such prices does not support any charge made in the complaint.

143 And afterwards, to-wit: at the May Term of said Court, on the 24th day of May, 1949, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein, to-wit:

Come again the parties by their respective attorneys, and the jury now returns into open Court its verdict as follows, to-wit:

"We, the jury, find for the plaintiff and assess its damages at \$325,000.00.

(Signed) Harold S. Spencer,
Foreman."

Upon the request of the defendants the jury is polled and each juror states that this is his verdict.

It is ordered by the Court that the jury be and it is hereby discharged.

144 And afterwards towit: at the May Term of said Court, on the 2nd day of June, 1949, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein towit:

Comes now the plaintiff by its attorneys and files motion for judgment and for allowance of attorney's fees, which motion is as follows:

145 IN THE DISTRICT COURT OF THE UNITED STATES.

• • (Caption—1524) • •

**MOTION FOR JUDGMENT AND FOR ALLOWANCE
OF ATTORNEY'S FEES.**

(Filed June 2, 1949. Albert C. Sogemeier, Clerk.)

Kiefer-Stewart Company, plaintiff in the above entitled cause, respectfully shows to the Court:

1. That the above-entitled cause was an action for damages brought by the plaintiff against the defendants, under Section 15, Title 15 of the United States Code, alleging violations by the defendants of Section 1 of the Act of Congress commonly known as the Sherman Antitrust Act (Title 15, U. S. C., Sec. 1).

2. That said cause was duly tried before this Court and a jury and resulted in a verdict of the jury in favor of plaintiff and against the defendants in the sum of Three Hundred Twenty-five Thousand Dollars (\$325,000.00).

3. That by virtue of said Section 15, Title 15, of the United States Code, plaintiff is entitled to have said damages trebled and judgment rendered therefor, together with the cost of suit, including a reasonable attorney's fee.

4. That plaintiff, in December, 1946, employed the law firm of Baker & Daniels, of Indianapolis, Indiana, to advise and represent plaintiff in the assertion of claims against the defendants; that after extensive investi-
146 gation by said attorneys of the facts and the law involved, this action was brought by said attorneys for and on behalf of plaintiff. That during the period following the filing of said action on September 13, 1947, to the date of said verdict on May 24, 1948, said attorneys rendered extensive services in the preparation for, and pros-

ecution of, the trial of this action. Plaintiff alleges that the fair and reasonable value of said attorney's services was not less than Seventy-Five Thousand Dollars (\$75,000.00).

Wherefore, plaintiff prays the Court for judgment for three (3) times the amount of the verdict in this cause, together with a reasonable attorney's fee, for costs and for all other proper relief, and that the Court fix a day, and give notice thereof to the parties, for the hearing of evidence on the matter of the attorney's fee to be allowed as part of the judgment herein.

(Signed) Joseph J. Daniels,

(Signed) William G. Davis,

*Attorneys for Plaintiff,
Kiefer-Stewart Company.*

Receipt of service of a copy of the foregoing motion is acknowledged this 2nd day of June, 1949.

(Signed) Davis, Baltzell, Hartsock & Dongus,

By Paul Y. Davis,

Attorneys for Defendants.

147 And afterwards to wit: at the May Term of said Court, on the 3rd day of June, 1949, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein to wit:

Come now the defendants by their attorneys and file motion for judgment notwithstanding the verdict, which motion is as follows:

148 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—1524) * *

(Filed June 3, 1949. Albert C. Sogemeier, Clerk.)

Defendants, and each of them, move the court to render judgment for the defendants, and each of them, notwithstanding the verdict of the jury, for each of the reasons following:

(1) There was no sufficient evidence to permit the jury to find that defendants or any of them had violated the Anti-trust laws of the United States, in that there was no evidence that defendants had combined or conspired in violation of such laws, or that any action taken

or contemplated by defendants was in restraint of trade or lessened competition in commerce.

(2) The court erred in refusing to instruct the jury to return a verdict for the defendants, as requested by defendants by their written requested instructions numbered one.

White & Case,
Davis, Baltzell, Hartsock & Dongus,
By (Signed) Paul Y. Davis,
Attorneys for Defendants.

We acknowledge service of the above motion this 3rd day of June, 1949.

Baker & Daniels,
By (Signed) William G. Davis,
Attorneys for Plaintiffs.

149 And afterwards to wit: at the May Term of said Court, on the 27th day of June, 1949, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein to wit:

This cause came on to be heard upon the plaintiff's motion for judgment upon the verdict of the jury and for allowance of attorney's fees, and upon defendants' motion for judgment notwithstanding the verdict of the jury.

And the Court, being sufficiently advised in the premises, now overrules the defendants' motion for judgment notwithstanding the verdict of the jury, to which the defendants at the time except.

And the Court having heard evidence on the matter of attorney's fees, now finds that the verdict of the jury, rendered herein on May 24, 1949, in the amount of \$325,000, should be trebled pursuant to law, that a reasonable attorney's fee for plaintiff's attorneys is the sum of Fifty Thousand Dollars (\$50,000.00), and that judgment should be rendered accordingly.

It is therefore Ordered and Adjudged that Kiefer-Stewart Company, plaintiff, have and recover from defendants, Joseph E. Seagram & Sons, Inc., Seagram Distillers Corporation, The Calvert Distilling Co. and Calvert Distillers Corporation, and each of them, the sum of Nine Hundred Seventy-Five Thousand Dollars (\$975,000.00) and a reasonable attorney's fee, to-wit: Fifty Thousand

Dollars (\$50,000.00), making a total sum of One Million Twenty-five Thousand Dollars (\$1,025,000.00) and the costs of this suit, which are now taxed at \$....., to the entry of which judgment defendants at the time except.

150 And afterwards towit: at the May Term of said Court, on the 22nd day of July, 1949, before the Honorable Robert C. Baltzell, Judge of said Court, the following further proceedings were had herein towit:

Come now the defendants by their attorney and file notice of appeal, which notice is as follows:

151 IN THE DISTRICT COURT OF THE UNITED STATES

For the Southern District of Indiana,

Indianapolis Division.

Kiefer-Stewart Company,
Plaintiff,

vs.

Joseph E. Seagram & Sons, Inc.,
Seagram-Distillers Corporation,
The Calvert Distilling Co., and
Calvert Distillers Corporation,
Defendants.

Civil Action
No. 1524.

NOTICE.

(Filed July 22, 1949. Albert C. Sogemeier, Clerk.)

Notice is hereby given that Joseph E. Seagram & Sons, Inc., Seagram-Distillers Corporation, The Calvert Distilling Co., and Calvert Distillers Corporation hereby appeal to the Court of Appeals for the Seventh Circuit from the final judgment entered in this action on June 27, 1949.

Davis, Baltzell, Hartsock & Dongus,

By (Signed) Paul Y. Davis,

*Attorneys for the above named
defendants.*

We acknowledge service of the above notice this 22 day of July, 1949.

Baker & Daniels,

By (Signed) G. R. Redding,

Attorneys for Plaintiff.

Statement of Points.

152 The defendants also file the statement of points upon which the defendants intend to rely on appeal, which statement of points is as follows:

153 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—1524) * *

STATEMENT OF POINTS UPON WHICH THE DEFENDANTS INTEND TO RELY ON APPEAL OF ABOVE CAUSE.

(Filed July 22, 1949. Albert C. Sogemeier, Clerk.)

1. The Court erred in refusing to give to the jury defendants' requested Instruction No. 1 requesting the Court to instruct the jury to return a verdict for the defendants.

2. The Court erred in overruling the defendants' motion for judgment, notwithstanding the verdict of the jury, and in refusing to enter such judgment for the defendants.

3. The Court erred in refusing to give to the jury each of the Instructions numbered from One to Eleven Inclusive, requested by the defendants to be given to the jury.

4. The Court erred in so much of his instructions to the jury as stated: "that it is no defense to this action even though the plaintiff and the other wholesalers entered into a conspiracy among themselves," and that that would be no defense if the defendants were guilty of the conspiracy charged in the complaint, to which portion of the Court's instruction exception was taken.

154 5. The Court erred in so much of the instructions given to the jury as stated, in substance, that the conspiracy to fix prices alleged in the complaint was per se illegal, to which portion of the Court's instructions exception was taken.

6. The Court erred in so much of the instructions given to the jury as stated, in substance, that the close affiliation of the defendants was immaterial in determining whether or not they had entered into a conspiracy to fix prices, to which portion of such instructions exception was taken by the defendants.

7. The Court erred in permitting to go to the jury over

the objection of the defendants, the answers of the witness Barden to questions objected to by defendants, in which such witness testified, in substance, that he had made a study and analysis in order to make an estimate of the loss of profits resulting to plaintiff during the years 1947, 1948 and the first three months of 1949, because of its not having the Seagram and Calvert line of whiskies; that his calculation of loss of profits during such period was \$679,378; that plaintiff had had sales of over \$10,000,000 in 1946, less than \$4,000,000 in 1947, slightly over \$3,000,000 in 1948, slightly over \$700,000 for the first three months of 1949, over \$2,000,000 for the same three months of 1946; that plaintiff's liquor sales for 1947 were 36.52 percent of its sales for 1946; for 1948, 28.52 percent of the 1946 sales and for the first three months of 1949,

32.44 percent of its 1946 sales; that the total loss of 155 sales for the years 1947, 1948 and the first quarter of 1949 was over \$16,000,000; that plaintiff realized an average profit of 61% on its liquor sales; that it would have realized an additional profit on \$16,000,000 in sales of approximately \$1,050,000 but that the figure of \$679,000 given by the witness was calculated on the basis which recognized a general decline in liquor business, whereas the \$16,000,000 was calculated by comparing actual sales.

8. The Court erred in permitting to go to the jury over the objections of the defendants, answers of the witness Lutz to questions objected to by the defendants, in which such witness testified, in substance, that in his opinion two-thirds of the loss in sales suffered by plaintiff during the years 1947, 1948 and the first three months of 1949 was due to the loss of the Seagram line and failure to get the Calvert line.

9. The Court erred in permitting the plaintiff to read to the jury, over the objection of the defendant, each of the answers to Interrogatories numbered 8, 9 and 10 propounded by plaintiff to and answered by the defendant Calvert Distillers Corporation.

10. The Court erred in permitting the plaintiff to read to jury, over the objection of the defendants, the answer to Interrogatory No. 24 propounded by plaintiff to and answered by defendant Calvert Distilling Company.

11. The Court erred in permitting the plaintiff to read to the jury, over the objection of the defendants, each of the answers to Interrogatories Nos. 31 and 32, propounded

Statement of Points.

by plaintiff to and answered by the defendant, Joseph E. Seagram & Sons, Inc.

156 12. The Court erred in permitting the plaintiff to read to the jury, over the objection of the defendants, the answer of Seagram Distillers Corporation to Interrogatory No. 7 propounded by plaintiff to and answered by the defendant Seagram Distillers Corporation.

White & Case,
Davis, Baltzell, Hartsock & Dongus,
By (Signed) Paul Y. Davis,
Attorneys for defendants.

We acknowledge service of the foregoing Statement of Points this 22 day of July, 1949.

Baker & Daniels,
By (Signed) G. R. Redding.

157 The defendants also file appeal bond in the sum of Two Hundred and Fifty Dollars (\$250.00) with the Fidelity and Deposit Company of Baltimore, Maryland, as surety thereon, which appeal bond is as follows:

158 IN THE DISTRICT COURT OF THE UNITED STATES.

• • (Caption—1524) • •

APPEAL BOND.

(Filed July 22, 1949. Albert C. Sogemeier, Clerk.)

Know All Men By These Presents: That Joseph E. Seagram & Sons, Inc., Seagram-Distillers Corporation, The Calvert Distilling Co. and Calvert Distillers Corporation, as Principals, and Fidelity & Deposit Company of Baltimore, Maryland, as Surety, are firmly bound unto Kiefer-Stewart Company, plaintiff in the above cause, in the sum of Two Hundred Fifty Dollars (\$250.00) for the payment of which, without relief, they do bind themselves, their successors and assigns.

The condition of the above obligation is such that if the said Principals shall duly prosecute their appeal to the Court of Appeals for the Seventh Circuit from the judgment rendered in the above entitled cause on the 159 27th day of June, 1949, and pay all costs which may be awarded against them on said appeal, then the above obligation is void; otherwise, to remain in full force and effect.

Dated this 22 day of July, 1949.

Joseph E. Seagram & Sons, Inc.,
Seagram-Distillers Corporation,
The Calvert Distilling Co., and
Calvert Distillers Corporation,
By (Signed) Paul Y. Davis,
Attorney,
Principals.

Fidelity & Deposit Company of Baltimore, Maryland,
By (Signed) Ben R. Turner, Jr.,
Attorney-In-Fact,
Surety.

(Seal)

160 The defendants also file designation of record on appeal, which designation is as follows:

161' IN THE DISTRICT COURT OF THE UNITED STATES.
 • • (Caption—1524) • •

DESIGNATION OF RECORD ON APPEAL.

(Filed July 22, 1949. Albert C. Sogemeier, Clerk.)

The Clerk of the United States District Court,
 For the Southern District of Indiana:

You will please prepare and certify for use on appeal to the Court of Appeals for the Seventh Circuit a transcript of the Record and proceedings in the above entitled cause and include therein the following:

1. Plaintiff's Complaint.
2. Defendants' Answer thereto.
3. Plaintiff's Supplemental Complaint thereto.
4. Defendants' Supplemental Answer thereto.
5. Order book entries showing trial and submission of said cause.
6. Requests for instructions to jury filed by both parties.
7. Stenographic transcript of the oral and documentary evidence given on trial of said cause and all objections thereto and rulings of the Court thereon.
- 162 8. The instructions given by the Court to the jury and all objections and exceptions thereto.
9. The verdict of the jury and entry of its return.
10. Motion of the defendants for judgment notwithstanding the verdict.
11. Motion of plaintiff for assessment of attorneys' fees and final judgment.
12. Ruling of the Court on defendants' motion for judgment notwithstanding the verdict, and final judgment in said cause.
13. Defendants' Notice of Appeal, Designation of Record, Statement of Points and Appeal Bond.

White & Case,

Davis, Baltzell, Hartsock & Dongus,

By (Signed) Paul Y. Davis,

Attorneys for defendants.

We acknowledge service of the foregoing Designation of Record on Appeal this 22 day of July, 1949.

Baker & Daniels,

By (Signed) G. R. Redding,

Clerk's Certificate.

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UNITED STATES DISTRICT COURT.

• • (Caption—1524) • •

CLERK'S CERTIFICATE.

I, Albert C. Sogemeier, Clerk of the United States District Court in and for the Southern District of Indiana, do hereby certify that the above and foregoing is a true and full transcript according to the Defendants-Appellants' designation filed August 26, 1949, now remaining among the records of said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Indianapolis, Indiana, this 29th day of August, 1949.

Albert C. Sogemeier,

*Clerk United States District
Court, Southern District of
Indiana.*

(Seal)

Transcript of The Evidence Certified Separately.
Exhibits of Plaintiff and Defendants Certified Separately.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

Chicago 10, Illinois.

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the printed transcript of record, filed December 16, 1949, in

Cause No. 10001.

Kiefer-Stewart Company,

vs.

Joseph E. Seagram & Sons, Inc., *et al.*,

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this 26th day of July, A. D. 1950.

(Seal)

Kenneth J. Carrick,
*Clerk of the United States Court of
Appeals for the Seventh Circuit.*

SUPPLEMENTAL TRANSCRIPT OF RECORD

United States Court of Appeals

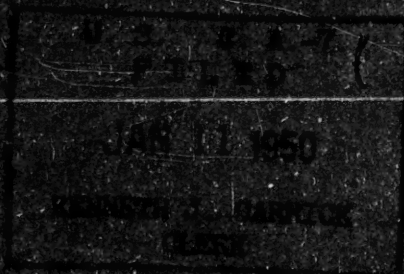
For the District of Columbia

No. 10001

KUMBLE STEWART COMPANY

Plaintiff-Appellee.

JOSEPH E. SHAGRAM & SONS, INC. SHAGRAM
 DISTILLERS CORPORATION, THE CALVEET DIS-
 TILLERS COMPANY AND CALVEET DISTILLERS
 CORPORATION.

Defendants-Appellants.

Approved for the United States District Court for the
 Southern District of Indiana, Indianapolis Division.

TRANSCRIPT OF RECORD FILED DEC. 28, 1949.
 PRINTED RECORD.

In the
United States Court of Appeals
For the Seventh Circuit

No. 10001

KIEFER-STEWART COMPANY,
Plaintiff-Appellee,
vs.

JOSEPH E. SEAGRAM & SONS, INC., SEAGRAM-
DISTILLERS CORPORATION, THE CALVERT DIS-
TILLING COMPANY AND CALVERT DISTILLERS
CORPORATION,

Defendants-Appellants.

Appeal from the United States District Court for the
Southern District of Indiana, Indianapolis Division.

1 **STIPULATION AS TO OMISSIONS FROM
TRANSCRIPT OF RECORD.**

Pursuant to Rule 75(h) of the Rules of Civil Procedure, it is hereby stipulated between defendants-appellants and plaintiff-appellee herein that the following evidence given upon the trial of said cause in the United States District Court for the Southern District of Indiana, Indianapolis Division, was omitted from the reporter's transcript of the evidence by mistake and the same should be included as part of the printed record herein, to-wit:

2 The following interrogatories propounded by plaintiff-appellee to defendant-appellant Calvert Distillers Corporation and the several answers thereto as follows:

Interrogatory No. 1.

(a) State when and where Calvert (Sales) was incorporated.

(b) State the capitalization of Calvert (Sales) as of July 31, 1946, and by whom its outstanding shares of voting capital stock were then held.

Answer to Interrogatory No. 1: (a) This defendant was incorporated in the State of Maryland August 23, 1934.

(b) Its capitalization as of July 31, 1946, was 1,000 shares of common stock of no par value having a stated value of \$25.00 per share, all of which was held by the Calvert Distilling Co.

Interrogatory No. 2.

State the names and positions of the executive officers of Calvert (Sales) as of November 1, 1946.

Answer to Interrogatory No. 2: The names and positions of the executive officers of this defendant as of November 1, 1946, were:

President, W. W. Wachtel.

Vice President, Treas., & Sec., James E. Friel.

Vice President, Tubie Resnik.

Controller, David R. Riach.

Asst. V. P., J. A. Gollin.

Asst. V. P., O. H. Martinsen.

3 **Interrogatory No. 3.**

State the names of the members of the Board of Directors of Calvert (Sales) as of the end of its fiscal years July 31, 1944 to July 31, 1947, inclusive.

2 *Interrogatories to Defendants and Answers.*

Answer to Interrogatory No. 3: The members of the Board of Directors of this defendant at the end of each of its fiscal years ending July 31, from 1944 to 1947, inclusive, were:

James E. Friel,
W. W. Wachtel,
Joseph G. Friel,
Tubie Resnik.

Interrogatory No. 4.

(a) State by whom the products sold by Calvert (Sales) are distilled, rectified or produced.

(b) Name the principal products and leading brands of whiskies sold by Calvert (Sales).

Answer to Interrogatory No. 4: The products sold by this defendant are produced by the Calvert Distilling Co. and the principal ones are: Lord Calvert, Calvert Reserve, Calvert Special and Calvert Gin.

Interrogatory No. 5.

(a) In how many states are the products of Calvert sold through wholesalers?

(b) Name such states.

Answer to Interrogatory No. 5: The products of this defendant are sold through wholesalers in 28 states which are: Massachusetts, Connecticut, New York, New Jersey, Rhode Island, Delaware, Maryland, Georgia, South Carolina, Florida, Louisiana, Kentucky, Tennessee, Indiana, Missouri, Illinois, Minnesota, Wisconsin, North Dakota, South Dakota, Nebraska, California, Colorado, New Mexico, Arizona, Texas, Arkansas and Nevada.

Interrogatory No. 6.

Has Calvert (Sales) ever sold or promoted the sale of Seagram brand products? If the answer is in the affirmative, state when and in what manner.

Answer to Interrogatory No. 6: No.

Interrogatory No. 7.

(a) State the names and positions of officers or employees of Calvert (Sales) who were between October 1, 1946 and April 1, 1947, responsible for the sale or promotion of sale of Calvert products to Indiana wholesalers, from the head sales officer of the corporation down to and including the employee in direct charge of the sales or promotional force in Indiana.

Interrogatories to Defendants and Answers.

3

Answer to Interrogatory No. 7: The names and positions of officers and employees of this defendant responsible for the sale or promotion of sale of its products to Indiana wholesalers between October 1, 1946 and April 1, 1947, were:

(a) Vice President in Charge of Sales—Tubie Resnik. Central Division Manager—William H. Schwalb. Indiana State Manager—Chester Olsen until 11/1/46.

(b) As of April 1, 1945, such officers were: Vice President in Charge of Sales: Tubie Resnik. Central Division Manager: William H. Schwalb. Indiana State Manager: Thomas E. Tarpey from 1/1/47 to date.

5 Interrogatory No. 8.

(a) State the annual volume of sales of Calvert products by Calvert (Sales) throughout the United States for each of the fiscal years ending July 31, 1938 to July 31, 1947, inclusive, both in dollars and number of cases of products sold.

(b) Furnish the same information for the fiscal year ending July 31, 1948.

Answer to Interrogatory No. 8: The annual volume of sales of Calvert products by Calvert (Sales) throughout the United States for each of the fiscal years ending July 31, 1938, to July 31, 1947, inclusive, both in dollars and number of cases of products sold and the same (b) information for the fiscal year ending July 31, 1948, is as follows:

(a) Year Ending

7/31

Cases

Dollars

1938	2,718,488	39,307,378.21
1939	2,798,393	41,299,208.09
1940	3,173,629	46,672,253.44
1941	3,014,315	48,933,328.82
1942	3,416,158	63,475,278.68
1943	3,355,468	74,789,612.53
1944	2,535,847	67,306,600.09
1945	3,101,253	92,003,095.60
1946	3,447,291	105,996,454.76
1947	3,960,487	130,875,990.89
1948	4,166,151	140,562,880.73

(b)

4 *Interrogatories to Defendants and Answers.*

Interrogatory No. 9.

State approximately by years what proportion of the sales described in Interrogatory No. 8 constituted sales of spirit blend whiskies.

Answer to Interrogatory No. 9: All sales of whiskey were spirit blend whiskies. Volume of sales set forth in answer to Interrogatory No. 8 includes sales of gin.

6 **Interrogatory No. 10.**

(a) State the annual volume of sales made by Calvert (Sales) to Indiana wholesalers for each of the fiscal years ending July 31, 1942 to July 31, 1947, inclusive, in dollars and in cases of products sold.

(b) State for such years the annual volume of whiskey sales made by Calvert (Sales) to Indiana wholesalers in dollars and in cases of products sold.

(c) Furnish the same information for the fiscal year ending July 31, 1948.

Answer to Interrogatory No. 10: (a) The annual volume of sales made by Calvert (Sales) to Indiana wholesalers for each of the fiscal years ending July 31, 1942 to July 31, 1947, inclusive, in dollars and in cases of products sold, and (b) the annual volume for such years of whiskey sales made by Calvert (Sales) to Indiana wholesalers in dollars and in cases of products sold, and (c) the same information for the fiscal year ending July 31, 1948, is as follows:

Year Ending 7/31	(a) Total Sales		(b) Whiskey Sales	
	C/S	\$	C/S	\$
1942	43,530	835,324.36	39,066	772,486.93
1943	48,996	1,083,077.14	48,996	1,083,077.14
1944	37,685	987,861.05	37,685	987,861.05
1945	50,973	1,529,868.03	50,973	1,529,868.03
1946	61,042	1,857,452.33	57,853	1,780,202.60
1947	68,410	2,357,629.98	66,535	2,306,725.94
(c) 1948	74,154	2,592,558.50	72,709	2,555,902.42

Note: "Products" have been interpreted to mean those of The Calvert Distilling Co.

Interrogatory No. 14.

State whether, between November 6, 1946 and February 3, 1947, any officer or employee of Seagram (Indiana), Seagram (Sales), or Distillers Corporation-Seagram,

Interrogatories to Defendants and Answers.

3

7 Ltd., communicated to, or conferred with, any officer or employee of Calvert (Sales) with reference to the delivery or non-delivery of Calvert products to Indiana wholesalers.

Answer to Interrogatory No. 14: Yes.

Interrogatory No. 15.

State whether, between November 6, 1946 and February 3, 1947, any officer or employee of Seagram (Indiana), Seagram (Sales) or Distillers Corporation-Seagram, Ltd., communicated to, or conferred with, any officer or employee of Calvert (Sales) with reference to the delivery or non-delivery of Calvert products to Kiefer-Stewart Company.

Answer to Interrogatory No. 15: Yes.

Interrogatory No. 16.

If the answer to Interrogatory No. 14 or Interrogatory No. 15 is in the affirmative, state the names of persons so conferring or sending or receiving such communications and the date or dates of such conferences or communications.

Answer to Interrogatory No. 16: The names of the persons so conferring were: Samuel Bronfman, Allen Bronfman, Victor Fischel, W. W. Wachtel, Frank Schwenkel, Tubie Resnick and possibly others whose names are unknown to defendant. Defendant is unable to give any specific dates of any such conferences or communications.

8 Interrogatory No. 23.

State whether at any time from November 1, 1946 to the date of a certain telephone call from William H. Schwalb of Calvert (Sales) to plaintiff, Kiefer-Stewart Company, on or about November 19, 1946, any representative of Calvert (Sales) stated or wrote to any representative of Kiefer-Stewart Company that the pricing policy of Kiefer-Stewart Company, which became effective November 6, 1946, did not meet with the approval of Calvert (Sales).

Answer to Interrogatory No. 23: Defendant has no information which would enable it to answer this interrogatory.

6 *Interrogatories to Defendants and Answers.*

Interrogatory No. 25.

State whether Calvert (Sales) at any time between November 1, 1946 and February 1, 1947, had in effect in Indiana any Fair Trade Act contracts relating to the price at which Calvert whiskies could be sold by Indiana wholesalers.

Answer to Interrogatory No. 25: Defendant has no record of any such fair trade contracts at the time mentioned and to the best of its information none such were then in force.

Interrogatory No. 26.

State the first date, subsequent to February 3, 1947, on which Calvert (Sales) began shipments of its products to Indiana wholesalers.

Answer to Interrogatory No. 26: Such shipments were resumed on or about February 4, 1947.

9 Interrogatory No. 27.

(a) In how many states are the products of Calvert (Sales) sold through wholesalers (herein referred to as the "open states")?

(b) In how many states through state-operated stores or channels (herein referred to as "monopoly states")?

(c) State whether the prices charged in monopoly states for your products are the same as those charged wholesalers in open states. If not, what were the differences in the prices of your three principal products (naming them) as of November 1, 1946?

(d) State whether the terms of sale (i. e. freight charges, cash discounts and time of payment) are the same in monopoly states as in open states. If not, what were the differences in such terms of sale as of November 1, 1946?

Answer to Interrogatory No. 27: (a) 28; (b) 17; (c) Prices charged Monopoly States are not the same as the prices charged in Open States. On Lord Calvert, there is a difference of 52¢ per case on fifths and on Calvert Reserve, there is a 68¢ differential, with the Monopoly States getting the lower price. (d) Terms of sale for both Monopoly and Open States are the same except that in Monopoly States customers receive a cash discount for payment within 20 days.

Interrogatories to Defendants and Answers.

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10. The following interrogatories propounded by plaintiff-appellee to defendant-appellant Calvert Distilling Company and the several answers thereto as follows:
Interrogatory No. 1.

(a) State the date and state of incorporation of Calvert.

(b) State the amount of capital stock and other securities of Calvert outstanding as of July 31, 1946, and by whom held.

Answer to Interrogatory No. 1: (a) This defendant was incorporated in the State of Maryland on October 6, 1933. (b) The amount of capital stock and other securities of this defendant outstanding as of July 31, 1946, was 6,010 shares of Common Stock and 33,000 shares of Preferred Stock, all held by Joseph E. Seagram & Sons, Inc.

Interrogatory No. 2.

State the names and positions held of the persons constituting the executive officers of Calvert as of July 31 in each of the years 1943 to 1947, inclusive.

Answer to Interrogatory No. 2 The names and positions held by persons constituting the executive officers of this defendant as of July 31 in each of the years 1943 to 1947, inclusive, were as follows:

1943 W. W. Wachtel	Vice President
James E. Eriel	Vice President and Treasurer
H. F. Willkie	Vice President

1944 The same

1946 The same, with the addition of David R. Riach, Controller

1945 The same

1947 The same as 1946

11 Interrogatory No. 3

State the names of the members of the Board of Directors of Calvert as of July 31 in each of the years 1943 to 1947, inclusive.

Answer to Interrogatory No. 3: The following were members of the Board of Directors of this defendant as of July 31 in each of the years 1943 to 1947, inclusive:

Interrogatories to Defendants and Answers.

July 1943 James E. Friel
Joseph G. Friel
Frederick J. Lind
W. W. Wachtel
H. F. Willkie

July 1944 James E. Friel
W. W. Wachtel
Joseph G. Friel
H. F. Willkie
Herbert Hornby
W. E. Collings

July 1945 H. F. Willkie
W. W. Wachtel
Herbert Hornby
Joseph G. Friel
W. E. Collings
James E. Friel

July 1946 W. W. Wachtel
James E. Friel
H. F. Willkie
Joseph G. Friel
W. E. Collings

July 1947 H. F. Willkie
W. W. Wachtel
W. E. Collings
Joseph G. Friel
James E. Friel

Interrogatory No. 11.

State the media used in such advertising of Calvert.

Answer to Interrogatory No. 11: The media used in such advertising were periodicals and display.

Interrogatory No. 12.

State whether any such advertising of Calvert referred to Seagram products or indicated the existence of any financial or corporate connection between Calvert and any Seagram company.

Answer to Interrogatory No. 12: No.

12 Interrogatory No. 13.

If the answer to Interrogatory No. 12 is in the affirmative, identify such advertising by date and state the nature of the reference or indication.

Answer to Interrogatory No. 13: Not answered by reason of answer to No. 12.

Interrogatory No. 14.

State whether Calvert has exercised any control over the sales policies of Calvert (Sales) from October 23, 1946, to the present date. If so, state the nature of such control.

Answer to Interrogatory No. 14: No.

Interrogatory No. 15.

State whether, between November 6, 1946 and February 3, 1947, any officer or employee of Seagram (Indiana), Seagram (Sales) or Distillers Corporation-Seagram, Ltd., communicated to, or conferred with, any officer of Calvert with reference to the delivery or non-delivery of Calvert products to Indiana wholesalers.

Answer to Interrogatory No. 15: Yes.

Interrogatory No. 16.

State whether, between November 6, 1946 and February 3, 1947, any officer or employee of Seagram (Indiana), Seagram-Distillers Corporation (hereinafter referred to as "Seagram (Sales)") or Distillers Corporation-Seagram, Ltd., communicated to, or conferred with, any officer of Calvert with reference to the delivery or non-delivery of Calvert products to Kiefer-Stewart Company.

Answer to Interrogatory No. 16: Yes.

13 Interrogatory No. 17.

If the answer to Interrogatory No. 15 or Interrogatory No. 16 is in the affirmative, state the names of persons so conferring or sending or receiving such communications and the date or dates of such conferences or communications.

Answer to Interrogatory No. 17: The names of the persons so conferring were: Samuel Bronfman, Allen Bronfman, James E. Friel, Victor Fischel, W. W. Wachtel, Frank Schwengel, Tubie Resnick and possibly others whose names are unknown to defendant. Defendant is unable to give any specific dates of any such conferences or communications.

Interrogatory No. 18.

State whether, prior to April 9, 1945, any securities, issued by Calvert and entitled to vote in the conduct of the latter's affairs, were owned by Seagram (Indiana).

Answer to Interrogatory No. 18: No.

Interrogatory No. 19.

(a) State whether there are any spirit blend whiskies produced by Calvert which are of substantially the same quality and price as any spirit blend whiskies sold by Seagram (Sales).

10 *Interrogatories to Defendants and Answers.*

(b) - Name the Calvert and the Seagram brands of spirit blend whiskies which are of substantially the same quality and are sold at substantially the same prices.

14 (c) State whether the Calvert products referred to in (b) are sold throughout the United States.

(d) State whether many retail liquor outlets throughout the United States sell both the Calvert products and the Seagram products referred to in (b) above.

Answer to Interrogatory No. 19: The answer to Interrogatory No. 19(a) is "yes"; 19(b) Seagram 7 Crown and Calvert Reserve; (c) the answer is "yes" with the qualification that sales are not made by defendant in any such States where sales are illegal; (d) "yes".

Interrogatory No. 24.

State the location and annual capacity of each of the distilleries used by Calvert in the production of whiskey.

Answer to Interrogatory No. 24: This defendant owns a distillery at Relay, Maryland, used in the production of whiskey, having an estimated daily average capacity for beverage production of 4,200 gallons, and for industrial production 9,300 gallons; and a distillery at Lawrenceburg, Kentucky, having an estimated daily average capacity for beverage production of 1,800 gallons and for industrial production of 2,400 gallons.

Interrogatory No. 25.

State the location and annual capacity, in terms of cases of bottled goods, of each of the rectifying and bottling plants owned by Calvert and used in the production of blended whisky.

15 Answer to Interrogatory No. 25: This defendant owns a bottling plant at Louisville, Kentucky, which, operating all of its four production lines, has an estimated daily average capacity of 17,280 12-bottle cases per eight-hour day; and a bottling plant at Relay, Maryland, which, operating all of its nine production lines, has an estimated daily average capacity of 38,880 12-bottle cases per eight-hour day.

Interrogatory No. 27.

(a) State whether Calvert received from Calvert (Sales) during October or November, 1946, any order or request to deliver any whisky to plaintiff, Kiefer-Stewart, upon receipt of Indiana Revenue stamps, or upon the happening of any other event.

(b) If so, state the name of the officer or employee of Calvert (Sales) issuing such instructions, the date thereof, and whether such instructions were in writing.

Answer to Interrogatory No. 27: No.

Interrogatory No. 29.

If Calvert received any such instructions, state when and by whom such instructions were countermanded and whether the same was in writing.

Answer to Interrogatory No. 29: Calvert received no such instructions.

16 Interrogatory No. 30.

(a) State whether Calvert received during November, 1946, from Calvert (Sales) or any other corporation or person any instructions to suspend shipments to Indiana wholesalers.

(b) If so, state the date of such instructions, by whom given and whether the same were in writing.

Answer to Interrogatory No. 30: (a) No.

Interrogatory No. 31.

(a) State whether in January or February, 1947, Calvert received any instructions from Calvert (Sales) or any other corporation or person to resume shipments to Indiana wholesalers.

(b) If so, state the date of such instructions, by whom given and whether the same were in writing.

Answer to Interrogatory No. 31: No instructions, but orders received from Calvert (Sales) and orders filled.

17 The following interrogatories propounded by plaintiff-appellee to defendant-appellant Joseph E. Seagram & Sons, Inc., and the several answers thereto as follows:

Interrogatory No. 1.

State the names and positions held of the persons constituting the executive officers of Seagram (Indiana) as of July 31 in each of the years 1943 to 1947, inclusive.

Answer to Interrogatory No. 1: The names and positions held by persons constituting the executive officers of this defendant in each of the years 1943 to 1947, inclusive, as of July 31, in each year, were:

1943 Frank R. Schwengel	President
James E. Friel	Vice President-Treasurer
H. F. Willkie	Vice President
Joseph G. Friel	Secretary

12 *Interrogatories to Defendants and Answers.*

1944 The same

1945 The same, with the addition of D. R. Riach as Controller

1946 The same as 1945

1947 The same as 1945

Interrogatory No. 2.

State the names of the members of the Board of Directors of Seagram (Indiana) as of July 31 in each of the years 1943 to 1947, inclusive.

Answer to Interrogatory No. 2: The names of the members of the Board of Directors of this defendant as of July 31 in each of the years 1943 to 1947, inclusive, were:

18 1943 James E. Friel

Frank R. Schwengel

Frederick J. Lind

H. F. Willkie

Victor A. Fischel

Joseph G. Friel

1945 Frank R. Schwengel

Victor A. Fischel

W. W. Wachtel

H. F. Willkie

Ellis D. Slater

Joseph G. Friel

James E. Friel

1944 James E. Friel

Frank R. Schwengel

H. F. Willkie

Joseph G. Friel

Victor A. Fischel

1946 The same as 1945

1947 The same as 1945

Interrogatory No. 14.

State the media used in such advertising of Seagram (Indiana).

Answer to Interrogatory No. 14: The media used in such advertising were periodicals and billboards.

Interrogatory No. 15.

State whether any such advertising of Seagram (Indiana) referred to Calvert products or indicated the existence of any financial or corporate connection between the Calvert Companies and Seagram (Indiana).

Answer to Interrogatory No. 15. No.

Interrogatory No. 16.

If the answer to Interrogatory 15 is in the affirmative, identify such advertising by date and state the nature of the reference or indication.

Answer to Interrogatory No. 16: Not answered by reason of the answer to Interrogatory No. 15.

19 Interrogatory No. 17.

State whether Seagram (Indiana) has exercised any control over the sales policies of Seagram (Sales) from October 23, 1946 to the present date. If so, state the nature of such control.

Answer to Interrogatory No. 17: This defendant has not exercised any control over the sales policies of Seagram Distillers Corporation from October 23, 1946, to the present date, but the two companies have some common officers and directors.

Interrogatory No. 18:

State whether during the year 1946 the Board of Directors or officers of Seagram (Indiana) determined upon any policy with reference to the prices to be charged for its products in the event of the termination of O.P.A. price regulation of the sale of liquor. If so, state by whom, and the date on which, such determination was made and if made by the Board of Directors, whether or not such determination was set out in minutes of meeting on said date of the Board of Directors.

Answer to Interrogatory No. 18: Neither the Board of Directors nor the officers of this defendant determined upon any policy with reference to the prices to be charged for its products in the year 1946 in the event of the termination of O.P.A. price regulation of the sale of liquor.

20 Interrogatory No. 19.

State whether, between November 6, 1946 and February 3, 1947, any officer or employee of Seagram (Indiana) communicated to, or conferred with, any officer of Calvert or Calvert Distillers Corporation (hereinafter referred to as "Calvert (Sales)") with reference to the delivery or non-delivery of Calvert products to Indiana wholesalers.

Answer to Interrogatory No. 19: No.

Interrogatory No. 20:

State whether, between November 6, 1946 and February 3, 1947, any officer or employee of Seagram (Indiana) communicated to, or conferred with, any officer of Calvert or Calvert (Sales) with reference to the delivery or non-delivery of Calvert products to Kiefer-Stewart Company.

Answer to Interrogatory No. 20: None.

14 *Interrogatories to Defendants and Answers.*

Interrogatory No. 21.

If the answer to Interrogatory No. 19 or Interrogatory No. 20 is in the affirmative, state the names of persons so conferring or sending or receiving such communications and the date or dates of such conferences or communications.

Answer to Interrogatory No. 21: Not answered by reason of answers to interrogatories Nos. 19 and 20.

21 Interrogatory No. 22.

State whether, prior to April 9, 1945, Seagram (Indiana) owned any securities, issued by Calvert and entitled to vote in the conduct of the latter's affairs.

Answer to Interrogatory No. 22: Prior to April 9, 1945, this defendant owned no securities issued by Calvert and entitled to vote in the conduct of the latter's affairs, but all of Calvert's securities entitled to vote prior to that date were owned by Distiller's Corporation-Seagram, Ltd., which also owned all the outstanding voting stock of defendant.

Interrogatory No. 31.

State the location and annual capacity of each of the distilleries owned by Seagram (Indiana) and used in the production of whisky.

Answer to Interrogatory No. 31: This defendant owns a distillery at Lawrenceburg, Indiana, used in the production of whiskey, having an estimated daily average capacity for beverage production of 9,000 gallons and for industrial production 15,000 gallons; and a distillery at Louisville, Kentucky, having an estimated daily average capacity for beverage production of 4,500 gallons and for industrial production of 9,750 gallons.

Interrogatory No. 32.

State the location and annual capacity, in terms of cases of bottled goods, of each of the rectifying and bottling plants owned by Seagram (Indiana) and used in the production of blended whiskey.

22 Answer to Interrogatory No. 32: This defendant owns a bottling plant at Lawrenceburg, Indiana, which, operating all of its ten production lines, has an estimated daily average capacity of 43,200, 12-bottle cases per eight-hour day.

Interrogatories to Defendants and Answers. 15

Interrogatory No. 34.

State whether Seagram (Indiana) or Seagram (Sales) purchases the whisky known as "V.O." from the Canadian Company which produces said whisky.

Answer to Interrogatory No. 34: Seagram's Sales.

Interrogatory No. 35.

If the answer to Interrogatory No. 34 is Seagram (Indiana) is such whisky sold to Seagram (Sales) in the same manner as the whisky produced by Seagram (Indiana).

Answer to Interrogatory No. 35: Not answered because of answer to Interrogatory No. 34.

Interrogatory No. 36.

If the answer to Interrogatory No. 34 is Seagram (Sales), is such whisky stored in warehouses of Seagram (Indiana) located at Lawrenceburg, Indiana, and, if so, under what arrangements is such whisky stored?

Answer to Interrogatory No. 36: Such whisky is stored in warehouses belonging to this defendant without charge until the same is ordered shipped.

23 The following interrogatories propounded by plaintiff-appellee to defendant-appellant Seagram-Distillers Corporation:

Interrogatory No. 1.

State the names and positions of the executive officers of Seagram (Sales) as of November 1, 1946.

Answer to Interrogatory No. 1: The names and positions held by persons constituting the executive officers of this defendant as of November 1, 1946, were:

Frank R. Schwengel, President
Victor A. Fischel, Vice President
James E. Friel, Vice President & Treas.
David R. Riach, Controller

Interrogatory No. 2.

State the names of the members of the Board of Directors of Seagram (Sales) as of November 1, 1946.

Answer to Interrogatory No. 2: The names of the members of the Board of Directors of this defendant as of November 1, 1946, were:

Frank R. Schwengel
James E. Friel
Victor A. Fischel

Interrogatory No. 4.

As of November 1, 1946, did Seagram (Sales) sell Seagram products to wholesale distributors in states other than Indiana and, if so, in what other states.

Answer to Interrogatory No. 4: The products of this defendant, are sold through wholesale in 27 states which are: Massachusetts, Connecticut, New York, New Jersey, Rhode Island, Delaware, Maryland, Georgia, South Carolina, Florida, Louisiana, Kentucky, Tennessee, Missouri, Illinois, Minnesota, Wisconsin, North Dakota, South Dakota, Nebraska, California, Colorado, New Mexico, Arizona, Texas, Arkansas and Nevada.

Interrogatory No. 5.

Has Seagram (Sales) ever sold or promoted the sale of Calvert products? If the answer is in the affirmative, state when and in what manner.

Answer to Interrogatory No. 5: No.

Interrogatory No. 6.

(a) State the names and positions of officers or employees of Seagram (Sales) who were between November 1, 1946 and April 1, 1947, connected with the sale of Seagram products to Indiana wholesalers from the head sales officer of the corporation down to the employee in direct charge of the sales force in Indiana.

(b) Furnish the same information as of April 1, 1945.

Answer to Interrogatory No. 6:

(a) Vice President in Charge of Sales: Victor A. Fischel.
Central Division Manager: William R. Teece. Indiana State Manager: Samuel A. Bernbach.

(b) Vice President in Charge of Sales: Victor A. Fischel.
Central Division Manager: William R. Teece, Indiana State Manager: H. K. Weirick.

(On April 1, 1945, Mr. Weirick was employed by Joseph E. Seagram & Sons, Inc. not Seagram-Distillers Corporation. The operations in Indiana were changed over to Seagram (Sales) on July 1, 1945.)

25 Interrogatory No. 7.

(a): State the annual volume of sales of Seagram products by Seagram (Sales) throughout the United States for the fiscal years ending July 31, 1938 to July 31, 1947, inclusive, both in dollars and number of cases of products sold.

Interrogatories to Defendants and Answers. 17

(b) Furnish the same information for the fiscal year ended July 31, 1948.

Answer to Interrogatory No. 7: (a) The annual volume of sales of Seagram products by Seagram (Sales) throughout the United States for the fiscal years ending July 31, 1938 to July 31, 1947, inclusive, both in dollars and number of cases of products sold and (b) the same information for the fiscal year ended July 31, 1948, is as follows:

(a) Year Ending 7/31	Cases	Dollars
Only the years 1946, 1947 and 1948 were read.		
1946	4,503,550	135,118,778.73
1947	6,045,941	194,500,790.85
(b) 1948	9,395,865	314,098,381.41

Interrogatory No. 13.

State whether at any time during the year 1946 the Board of Directors or officers of Seagram (Sales) determined upon any policy with reference to the prices to be charged for its products in the event of the termination of O.P.A. price regulation of the sale of liquor. If so, state by whom, and the date on which, such determination was made and, if made by the Board of Directors of Seagram (Sales), whether or not such determination was set out in minutes of the Board of Directors.

Answer to Interrogatory No. 13: No such determination was made by the Board of Directors of this defendant and no such determination was set out in the Minutes of the defendant's Board of Directors. Victor Fischel, President of this defendant, did determine upon a policy with reference to the prices to be charged for defendant's products in the event of the determination of O.P.A. price regulation of the sale of liquor shortly prior to the withdrawal of the determination of such regulation.

Interrogatory No. 14.

State whether, between November 6, 1946 and February 3, 1947, any officer or employee of Seagram (Sales) communicated to, or conferred with, any officer of Calvert or Calvert (Sales) with reference to the delivery or non-delivery of Calvert products to Indiana wholesalers.

Answer to Interrogatory No. 14: Yes.

18 *Interrogatories to Defendants and Answers.*

Interrogatory No. 15.

State whether, between November 6, 1946 and February 3, 1947, any officer or employee of Seagram (Sales) communicated to, or conferred with, any officer of Calvert or Calvert (Sales) with reference to the delivery or non-delivery of Calvert products to Kiefer-Stewart Company.

27 Answer to Interrogatory No. 15: Yes.

Interrogatory No. 16.

If the answer to Interrogatory No. 14 or Interrogatory No. 15 is in the affirmative, state the names of persons so conferring or sending or receiving such communications and the date or dates of such conferences or communications.

Answer to Interrogatory No. 16: The names of the persons so conferring were: Victor Fischel, W. W. Wachtel, Frank Schwengel, Tubie Resnick and possibly others whose names are unknown to defendant. Defendant is unable to give any specific dates of any such conferences or communications.

Interrogatory No. 20.

State the media used in such advertising of Seagram (Sales).

Answer to Interrogatory No. 20: The media used in such advertising were periodicals and display.

Interrogatory No. 21.

State whether any such advertising of Seagram (Sales) referred to Calvert products or indicated the existence of any financial or corporate connection between the Calvert Companies and Seagram (Sales).

Answer to Interrogatory No. 21: No.

Interrogatory No. 22.

If the answer to Interrogatory No. 21 is in the affirmative, identify such advertising by date, place of publication and state the nature of the reference or indication.

28 Answer to Interrogatory No. 22: Not answered by reason of the answer to Interrogatory No. 21.

Interrogatory No. 23

State whether Seagram (Sales) during October or November, 1946, dispatched to its wholesalers or other distributors in any states other than the State of Indiana

Interrogatories to Defendants and Answers. 19

any communications identical with or similar in purport to the telegrams addressed to plaintiff and other Indiana wholesalers on November 6, 1946, and reading substantially as follows:

"Despite the higher costs of production and of doing business generally, Seagram has decided to maintain former OPA prices on all brands. This decision was reached because of our sincere belief that it is not in our nor the public's interest to raise whiskey prices. By holding the price line we can win the fullest measure of public appreciation and confidence in our industry. Because the entire industry, distillers, wholesalers and retailers alike have enjoyed their most successful period in the last few years, we do not hesitate to request your support of this policy of holding the price line. We further request that you ask your retailers, both package store and on premise outlets not to increase prices either by the drink or by the bottle. May we have immediate assurance of your full cooperation and information on the steps you are taking to this end.

Victor A. Fischel,
*Vice President and General Sales
 Manager Seagram Distillers
 Corp."*

Answer to Interrogatory No. 23: Yes.

Interrogatory No. 24

If so, indicate the states of the United States to which such a communication was sent to wholesalers or other distributors and the name of each wholesaler or other distributor in each such state to whom such communication was sent. In the alternative, if such communication was sent to substantially all wholesalers or other distributors, it may be so stated, without specification of names.

29 Answer to Interrogatory No. 24: Such communication was sent to substantially all wholesalers.

Interrogatory No. 25

(a) State whether Seagram (Sales) obtained from any wholesalers named or referred to in Interrogatory No. 24 any written or telegraphic assurance of cooperation or information of the type referred to in the last sentence of the telegram set out above in Interrogatory No. 23.

(b) If so, identify the same by date and the name of wholesaler or distributor.

20 *Interrogatories to Defendants and Answers.*

(c) If Seagram (Sales) received any verbal assurance of such cooperation or any such information on the steps being taken, whether by telephone, or otherwise, state when and from whom the same was received.

Answer to Interrogatory No. 25: (a) Yes.

(b) Defendant is unable at this time to furnish the names of such wholesalers and distributors because they are so numerous and would require a search of its entire correspondence files. There were probably as many as 300.

(c) Defendant received some verbal assurance of cooperation but is at present unable to state from whom or when such assurances were received.

Interrogatory No. 26

(a) State whether during the period from (November 1, 1946 to March 1, 1947, any shipments were suspended by Seagram (Sales) to any wholesaler or distributor of Seagram products in any state other than the State of Indiana with which wholesaler or distributor Seagram (Sales) had had or was having during such period a dispute, controversy or disagreement over the price policy of such wholesaler or distributor.

30 (b) If so, state the name and address of each wholesaler or distributor to whom shipments were so suspended.

Answer to Interrogatory No. 26: No.

Interrogatory No. 27

State whether Seagram (Sales) at any time between November 1, 1946 and February 1, 1947, had in effect in Indiana any Fair Trade contracts relating to price at which Seagram whiskey could be sold by Indiana wholesalers. If so, state the brands of whiskey to which such contracts applied.

Answer to Interrogatory No. 27: Defendant has no record of any such fair trade contracts at the time mentioned and to the best of its information none such were then in force.

31 It is further stipulated that objections made to the introduction of certain answers to certain of said interrogatories propounded to Calvert Distillers Corporation and the rulings upon said objections appear at pages 144 to 146, inclusive, of the printed transcript; that objections made to the introduction of certain answers to certain of

Interrogatories to Defendants and Answers. 21

said interrogatories propounded to Calvert Distilling Company and the rulings upon said objections appear at pages 146 and 147, inclusive, of the printed transcript; that objections made to the introduction of certain answers to certain of said interrogatories propounded to Joseph E. Seagram & Sons, Inc., and the rulings upon said objections appear at pages 147 and 148, inclusive, of the printed transcript; and that objections made to the introduction of certain answers to certain of said interrogatories propounded to Seagram Distillers Corporation and the rulings upon said objections appear at page 148 of the printed transcript.

Plaintiff-appellee and defendants-appellants jointly request the Court to order the above stipulation printed as a supplement to the printed record heretofore filed herein.

White & Case,
Davis, Baltzell, Hartsock & Dongus
By Paul Y. Davis,
*Attorneys for Defendants-
Appellants.*

Baker & Daniels
By William G. Davis,
*Attorneys for Plaintiff-
Appellee.*

32 Endorsed: In the United States Court of Appeals.
• • (Caption—10001) • • Stipulation as to Omissions
from Transcript of Record. Filed Dec. 28, 1949. Kenneth
J. Carrick, Clerk.

22

Order re: Supplemental Record.

33

UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

Chicago 10, Illinois.

December 30, 1949.

Before:

Hon. Otto Kerner, Circuit Judge.

• • (Caption—10001) • •

It is ordered that the stipulation of counsel as to omissions from the transcript of record be, and the same is hereby, approved.

On petition of counsel for the defendants-appellants, it is further ordered that the time for filing the appellants' brief herein be, and the same is hereby, extended until ten (10) days after the filing of the supplemental printed record resulting from the said stipulation.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

Chicago 10, Illinois.

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the printed supplemental transcript of record, filed Jan. 11, 1950, in

Cause No. 10001.

Kiefer-Stewart Company,

vs.

Joseph E. Seagram & Sons, Inc., *et al.*,

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this fourteenth day of July, A. D. 1950.

(Seal)

Kenneth J. Carrick,
*Clerk of the United States Court of
Appeals for the Seventh Circuit.*

At a regular term of the United States Court of Appeals for the Seventh Circuit, held in the city of Chicago and begun on the fifth day of October, in the year of our Lord one thousand, nine hundred and forty-eight, and of our Independence the one hundred seventy-third.

Kiefer-Stewart Company,
Plaintiff-Appellee,

No. 10001. *vs.*

Joseph E. Seagram & Sons, Inc.,
Seagram-Distillers Corporation,
The Calvert Distilling Company
and Calvert Distillers Corporation,
Defendants-Appellants.

} Appeal from the
United States Dis-
trict Court for the
Southern District
of Indiana, Indian-
apolis Division.

And afterward, to-wit, on the twenty-eighth day of December, 1949 there was filed in the office of the Clerk of this Court a stipulation relative to omissions in the record, which said stipulation is not copied herein.

And afterward, to-wit, on the ninth day of May, 1950, there was filed in the office of the Clerk of this Court the opinion of the Court, which said opinion is in the words and figures following, to-wit:

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

No. 10001. OCTOBER TERM, 1949, APRIL SESSION, 1950.

Kiefer-Stewart Company, <i>Plaintiff-Appellee,</i> <i>vs.</i> Joseph E. Seagram & Sons, Inc., Seagram-Distillers Corporation, The Calvert Distilling Company and Calvert Distillers Corpora- tion, <i>Defendants-Appellants.</i>	} Appeal from the United States Dis- trict Court for the Southern District of Indiana, Indian- apolis Division.
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May 9, 1950.

Before MAJOR, Chief Judge, KERNER and DUFFY, Circuit Judges.

MAJOR, Chief Judge. This is an action for damages resulting from alleged violations of Section 1 of the Sherman Act and Section 7 of the Clayton Act (Title 15 U.S.C.A. Secs. 1 and 18), brought pursuant to Title 15 U.S.C.A. Sec. 15. A trial was had before a jury which returned a verdict in favor of the plaintiff in the amount of \$325,000. Thereupon, a judgment was rendered for treble the amount of the verdict, plus \$50,000 attorneys fees. From this judgment defendants appeal.

Defendant Joseph E. Seagram & Sons, Inc., generally referred to as Seagram, Indiana, is an Indiana corporation and is a wholly owned subsidiary of Distillers Corporation Seagrams Ltd. of Canada (the latter not a party to this suit). Defendants Seagram-Distillers Corporation,

a Delaware corporation, usually referred to as Seagram, Sales, and Calvert Distilling Company, a Maryland corporation, usually referred to as Calvert, are wholly owned subsidiaries of Joseph E. Seagram & Sons, Inc. Defendant Calvert Distillers Corporation is a Maryland corporation, usually referred to as Calvert Sales, and is a wholly owned subsidiary of Calvert Distilling Company. Seagram, Indiana and Calvert are engaged in the manufacture of distilled spirits, and Seagram, Sales and Calvert, Sales, in the sale and distribution of the liquor manufactured by their respective parent corporations. The sales and distributions thus made by the defendants extended throughout the United States, including the State of Indiana. While Calvert prior to 1945 had been a wholly owned subsidiary of Distillers Corporation Seagram Ltd., the latter corporation on April 9, 1945 transferred all its stock in Calvert to Seagram, Indiana. Thus, from that time on both Calvert and Seagram, Sales were wholly owned subsidiaries of Seagram, Indiana, and Calvert, Sales was a wholly owned subsidiary of Calvert.

Plaintiff is a wholesale drug concern which has long been engaged in the wholesale liquor business in the State of Indiana. Beginning in February 1934, it became a distributor for Seagram products, and as such wholesaler extensively sold and supplied those authorized to retail liquor in that State. Plaintiff was not at any time a distributor of Calvert products, but in the latter part of 1946 accepted an offer by Calvert to become its distributor, with a commitment from Calvert to supply an agreed quantity of liquor.

Plaintiff in its brief states: "The gravamen of plaintiff's claim, as submitted to the jury, was that as a proximate result of a conspiracy between the defendants to fix the resale price of their products, plaintiff, a liquor wholesaler, had lost the Seagram and Calvert lines of whiskies and other products, with consequent large damage to its business." To this might be added that the theory embodied in the complaint as well as that upon which the case was tried was that the defendants entered into a price fixing conspiracy illegal *per se*.

It may be noted that the complaint was premised in part upon the alleged unlawful acquisition by Seagram, Indiana of the common stock of Calvert on April 9, 1945. It is alleged: "By reason of such unlawful stock acquisition, the independent management, sales organization, and sales pol-

icy, which, as aforesaid, prompted Calvert and Calvert (Sales) to expand their Indiana market in competition with defendants Seagram (Indiana) and Seagram (Sales) and to appoint plaintiff as a Calvert distributor and to contact and agree to supply Calvert products to plaintiff in competition with the products of Seagram (Indiana) and Seagram (Sales), became subject to the influence of the executive officers of Seagram (Indiana), who, by such acquisition had gained control over the Boards of Directors and over the outstanding securities of Calvert and Calvert (Sales)."

There being no proof, however, that competition between Seagram and Calvert was affected by reason of the former's acquisition of the latter's stock, the cause of action predicated thereon has been abandoned by the plaintiff and reliance is placed solely upon a violation of Sec. 1.

We are confronted with numerous contested issues which in the main may be stated thus:

1. That the trial court erred in refusing to direct a verdict for the defendants and in refusing to enter a judgment notwithstanding the verdict on two grounds, viz.,

- (a) That the evidence was insufficient to take the case to a jury on the allegation that a "contract, combination . . . or conspiracy" existed between the defendants in violation of Sec. 1 of the Sherman Act;

- (b) That under the uncontradicted evidence the activities of the defendants even if in concert were not in restraint of trade and therefore not violative of Sec. 1 of the Sherman Act.

2. That the trial court erred in refusing to instruct the jury that no violation of Sec. 7 of the Clayton Act had been shown.

3. That the trial court erred in instructing the jury that it would constitute "no defense to this action, even though the plaintiff and the other wholesalers entered into a conspiracy among themselves."

There are numerous other errors assigned relative to the claimed erroneous admission and exclusion of evidence which, in the view we take of the case, need not be stated.

Plaintiff insists that there was adequate proof to present an issue for the jury as to whether defendants engaged in a conspiracy to fix the price at which their products were

to be sold by the wholesale liquor dealers of Indiana, including plaintiff. On the other hand, defendants insist that there was no proof of such conspiracy but that the proof conclusively demonstrates that they pursued an independent course. We approach an appraisal of the proof with a full realization that it must be considered in a light most favorable to the plaintiff, and that the plaintiff is entitled to all reasonable inferences which may be deduced therefrom. With this thought in mind, we shall discuss the facts as they appear in plaintiff's brief, which we assume are as favorable to it as the record will justify.

During the period of O.P.A., liquor wholesalers were permitted to sell whiskies at 15% above cost but they were not permitted to include in such costs taxes imposed by the Federal or State governments. Thus, during this period of governmental regulation the profit of wholesalers was reduced to approximately 10% of the selling price. On October 23, 1946, O.P.A. regulations of liquor prices terminated. Prior thereto, plaintiff had decided upon such termination to apply its current 15% mark-up to its over-all costs, including Federal and State taxes. On October 31, 1946, a meeting was held of the Indiana Wholesale Liquor Dealers Association, attended by the plaintiff. Price changes made possible by the termination of O.P.A. were discussed. Immediately following this meeting a majority of the Indiana wholesalers, including plaintiff, filed with the Indiana Alcoholic Beverage Commission identical schedules of increased prices on spirits, wines and cordials.

Victor A. Fischel, vice president of Seagram, Sales, shortly prior to the expiration of the O.P.A. price regulation (October 23, 1946), determined upon a policy with reference to the prices to be charged for Seagram's products in the event of the termination of O.P.A., and on November 6, 1946 sent a telegram to all wholesalers in the United States as follows:

"Despite the higher costs of production and of doing business generally, Seagram has decided to maintain former OPA prices on all brands. This decision was reached because of our sincere belief that it is not in our nor the public's interest, to raise whiskey prices. By holding the price line we can win the fullest measure of public appreciation and confidence in our industry. Because the entire industry, distillers, wholesalers and retailers alike have enjoyed their most successful period in the last few years, we do not hesitate to request

your support of this policy of holding the price line. We further request that you ask your retailers, both package store and on premise outlets not to increase prices either by the drink or by the bottle. May we have immediate assurance of your full cooperation and information on the steps you are taking to this end."

On or about the same date this telegram was dispatched, Seagram suspended shipments to all Indiana wholesalers, including the plaintiff, because of their refusal to subscribe to the policy which Seagram had announced. On February 3, 1947, the wholesalers of Indiana, with the exception of plaintiff, filed notification with the Indiana Commission of their return to the O.P.A. method of the application of the existing 15% mark-up to only a part of the wholesaler's cost. Plaintiff refused to return to the old method and to subscribe to the policy announced by Seagram, and shipments to it were never resumed.

We now turn to the facts concerning Calvert, as shown by plaintiff's brief. Beginning in 1942, Calvert attempted on several occasions to obtain the facilities of plaintiff as one of its Indiana distributors. These overtures by Calvert culminated in October 1946 in an offer by Calvert to plaintiff of a distributorship, accompanied by the promise shortly thereafter of a sufficient amount of merchandise (two to three thousand cases per month) to interest plaintiff in taking on the Calvert line. At meetings in Indianapolis on November 5 and November 12, 1946, Calvert promised to supply plaintiff from two to three thousand cases of its product per month, made allocation of two thousand cases each for November and December 1946, and received from plaintiff Indiana revenue stamps covering these allotments. At the meeting between plaintiff and Calvert on November 5, 1946, Calvert's central division manager, Schwalb, brought up the subject of plaintiff's increased price change on its products and said it would have no effect on Calvert's shipment, that Calvert wanted to get into the market and this was a "swell opportunity." On November 12, 1946, a large sales meeting for launching the Calvert line with plaintiff was planned for November 23. At the meeting on November 12, Seagram's price policy was discussed (no Seagram official was present) and the State manager for Calvert said that it still wanted to go along with plaintiff as a distributor. Gollin, assistant general sales manager of Calvert in New York, then stated by telephone to plaintiff's representative that the Seagram situation was going to

make no difference, that he was going to guarantee personally that the merchandise would be delivered and for plaintiff to go ahead and make arrangements for the sales meeting.

Thereafter, on November 19, 1946, Moxley, plaintiff's president, received a telephone call from Schwalb at Chicago, saying that Calvert was not going to be able to ship the Calvert products that had been engaged to plaintiff, that Calvert was going along with Seagram on the latter's sales policy, that Calvert was terribly sorry but "had to go along with Seagram." Moxley immediately called Resnik, Calvert's general sales manager, at his New York office, reporting his telephone conversation with Schwalb. Resnik said that he was terribly sorry but that Calvert would have to withdraw from the arrangement. Upon being pressed for a reason, he said "he had to go along with the other side of the house." (These statements were denied by Calvert's officials but for the present purpose must be accepted as having been made.) Thereupon, Calvert struck plaintiff from its list of authorized distributors and refused to make any shipments.

Commencing about July 1, 1947, both Seagram and Calvert entered into fair trade contracts with all of their Indiana wholesalers except plaintiff, which contained provisions and price postings whereby the O.P.A. prices were prescribed as the minimum prices at which their goods could be sold by their Indiana wholesalers. (There is no contention that these agreements were illegal and we discern no connection between them and the conspiracy alleged.)

The above statement includes all the proof introduced at the trial to show a conspiracy or combination between Seagram and Calvert to fix the resale price which wholesalers were to charge for their products, as well as the means of forcing adherence to such resale prices—that is, by the cancellation of their distributorships upon such refusal.

We are wholly unable to discern how this testimony relied upon by plaintiff proves or tends to prove, by inference or otherwise, that Seagram and Calvert acted in concert or combination. On the other hand, it strongly indicates that each formulated its own policy and pursued an independent course. Seagram formulated its policy prior to the expira-

1. Plaintiff also relies upon the answers to certain interrogatories made by the officials of Seagram and Calvert, and upon certain contradictory statements asserted to have been made by defendants' witnesses on cross-examination. These matters will be subsequently referred to.

tion of O.P.A. (October 23, 1946) and publicly proclaimed such policy to all wholesale liquor dealers by its telegram of November 6. That such policy was formulated and proclaimed by Seagram without any agreement or connivance with Calvert is hardly open to question, and the proof shows that during this time and up to November 19, 1946, Calvert was pursuing its own independent course, which was directly opposite to that which had been announced by Seagram. The proof in this respect is consistent with the complaint, which alleges:

"At or about the same time that defendants Seagram (Indiana) and Seagram (Sales) were advising Indiana whisky distributors of their aforesaid policy with respect to the maintenance of existing wholesale prices, the sales organizations of defendants Calvert and Calvert (Sales) advised plaintiff that said Calvert companies did not intend to interfere with the resale prices charged by wholesalers for Calvert's products; that Calvert would continue to ship to the Indiana market, and that any altercation between said Seagram Companies and their Indiana wholesalers would afford said Calvert Companies an opportunity to increase substantially their Indiana market, of which opportunity they intended to take advantage."

Thus, both the proof and the allegations of the complaint demonstrate that while Seagram was refusing to sell to those who failed to subscribe to its announced policy, Calvert had awarded plaintiff a distributorship and was preparing and promising to make delivery to plaintiff on the latter's terms, and this irrespective of the policy which had been announced by Seagram. And it is significant that Seagram continued without any deviation to adhere to the policy which it originally announced.

It is true that Calvert subsequently abandoned its policy, repudiated its promise to make delivery to plaintiff and stated in effect that it would follow the policy which had formerly been announced and put into effect by Seagram. Great stress is laid upon statements by Calvert made on November 19, "We are going along with Seagram on their sales policy. We are terribly sorry but we have to go along with Seagram," and "he had to go along with the other side of the house." These statements were made by agents or officers of Calvert out of the presence and, so far as the record discloses, without the knowledge or approval of

Seagram or any of its officials. Such statements were not binding upon Seagram and, of course, are no proof that it was or became a party to a conspiracy or combination. While the acts and statements of the members of a conspiracy are admissible and binding against all, we know of no rule which permits the statements of an alleged member to be utilized both to prove the conspiracy and at the same time to bind its members. And the argument that the sudden shift in Calvert's announced policy to coincide with that formerly announced and put into practice by Seagram gives rise to an inference of conspiracy is also without merit. The act of Calvert in changing its announced policy was no more binding on Seagram than the statements made by Calvert's officers as their excuse for changing its policy and repudiating its promise to plaintiff. The significant point is that Seagram at that time made no change but continued the same policy which it had independently announced and put into practice. The most the proof shows is that Calvert for reasons of its own decided to abandon its policy and to follow that in practice by its competitor. There is not a scintilla of proof that this shift in the position of Calvert was at the request, invitation, demand or suggestion of Seagram. This action on the part of Calvert does not prove or tend to prove that it was done by agreement with Seagram any more than proof that a hound is chasing a fox is evidence that the chase is by agreement with the fox.

The testimony which we have so far discussed is that offered by the plaintiff at the trial to prove a conspiracy. There are some additional matters, however, shown by the record and urged by the plaintiff in support of its contention that a conspiracy was proven. Of such additional matters, the most important perhaps are the answers to certain interrogatories propounded by plaintiff to officials of both Seagram and Calvert prior to and admitted at the trial. To Friel, a Seagram official, there was propounded the following interrogatory: "State whether, between November 6, 1946 and February 3, 1947, any officer or employee of Seagram (Sales) communicated to, or conferred with, any officer of Calvert or Calvert (Sales) with reference to the delivery or non-delivery of Calvert products to Kiefer-Stewart Company." His answer to such interrogatory was "Yes." He was then requested to state "the names of persons so conferring or sending or receiving such communications and the date or dates of such conferences or communi-

cations." He answered as follows: "The names of the persons so conferring were: Victor Fischel, W. W. Wachtel, Frank Schwengel, Tubie Resnick and possibly others whose names are unknown to defendant. Defendant is unable to give any specific dates of any such conferences or communications." A similar interrogatory propounded to an official of Calvert was also answered in the affirmative, and substantially the same persons named as being those "conferring or sending or receiving such communications" and also that Calvert "was unable to give any specific dates of any of such conferences or communications."

How the answers to these questions furnish any support to the conspiracy charged is not discernible. It is true the answers disclose that conferences were held between the officials of Seagram and Calvert "with reference to the delivery or non-delivery of Calvert products to Kiefer-Stewart Company" sometime between November 6, 1946 and February 3, 1947. Even so, the information thus obtained is so indefinite and uncertain both as to the time and subject matter as to strip it of all probative value. If such a conference took place early in November or about the time Calvert changed its position, some connection might be inferred. On the other hand, if the conference did not take place until February of the following year, it could hardly be inferred that there was any connection between such a conference and Calvert's change of position which had taken place some three months previously. And the subject matter of information thus obtained is also of such an uncertain and indefinite nature as to carry no weight.

The fact that they conferred proves nothing more than an opportunity to reach an understanding or to make an agreement. An inference that they did so can be nothing more than a guess. Especially is this so in view of the uncertainty as to when the conference took place relative to the time the alleged agreement must have been made. Even though the conference had to do with "the delivery or non-delivery of Calvert products to Kiefer-Stewart Company," many matters might have been considered other than the agreement alleged, and we note one plausible reason for a conference—that was the predicament with which the defendants were faced by reason of the action of the plaintiff and other wholesalers in ostensibly announcing a policy by which they would all sell to the retailers at a fixed price. In fact, defendants pleaded this situation as a defense and it was assigned by them as a reason, particu-

larly by Seagram, for their refusal to supply the wholesalers with liquor. That they had a concrete reason for being concerned is shown by the fact that some of the instant defendants had been convicted and penalized in a criminal prosecution under circumstances much akin to those of the instant situation. See *United States v. Frankfort Distilleries, Inc.*, 324 U. S. 293. If they had sold to the wholesalers with knowledge that the latter were engaged in a price fixing conspiracy of their own, defendants might have found themselves impaled on one prong of a two-horned dilemma. By refusing to sell under such circumstances, they now find themselves impaled on the other horn. Therefore, if a guess is to be made as to the purpose of the conference, we think the situation thus disclosed affords a more reasonable basis for the same.

Plaintiff also relies upon certain alleged inconsistent and false answers made by defendants' witnesses on cross-examination. The most important item referred to in this phase of the argument is that Fischel, vice president of Seagram, Sales, stated on cross-examination that he "did not discuss with them (Calvert) at all" the matter of delivery of whisky to wholesalers in Indiana. He denied that he was present at any conference between officials of the two companies, although he was one of those named by Friel of Seagram in response to an interrogatory as above shown. Subsequently Fischel was recalled to the stand and attempted to explain his testimony by stating that what he intended to say was that he had had no conversation with Calvert officials prior to November 6. As we have already shown, the answers to the interrogatories prove nothing insofar as they relate to the conspiracy charged, and we think it evident that its probative value could not be enhanced by Fischel whether he affirmed or denied it. Wachtel, president of Calvert Distillers Corporation, who was also named as being present by Friel in response to the interrogatory, denied that any conferences were held "before the act," but admitted that he had "exchanged information with Seagram" "after the act." We see no contradiction between this testimony and Friel's answer to the interrogatory. As already noted, the answer to the interrogatory fixed no date for the conference other than that it took place between November 6, 1946 and February 3, 1947. Other discrepancies referred to relate to certain minor contradictions between the testimony of different

officials of Calvert and likewise furnish no proof of the conspiracy charged.

In our view, the evidence fails to show that the defendants acted in concert or as a result of conspiracy. On the other hand, it strongly indicates that Seagram and Calvert formulated and pursued their own independent courses. That such was the case in the beginning is hardly open to doubt, and the fact that these courses at some time along the road took a similar pattern is not proof, in our judgment, that such similarity was the result of a conspiracy.

Assuming, however, contrary to what we hold, that the proof was sufficient to show that the defendants acted in concert, we think there is another obstacle fatal to plaintiff's right to prevail. The complaint alleged that the defendants conspired "unlawfully to agree upon and fix the resale prices of said defendants' respective whiskies sold to wholesalers in Indiana and unlawfully to cut off and cease all shipments of their respective whiskies both in interstate and intrastate commerce to such of the Indiana wholesalers as did not agree to abide by the resale prices so fixed and agreed upon by the said defendants." Thus, a price fixing agreement was alleged and it was upon this theory that the case was tried, submitted to the jury, and upon the same theory the judgment is now sought to be affirmed. Plaintiff in its brief states, "The issue of fact is whether Seagram and Calvert concertedly determined to fix the resale price of their products."

Was the agreement which we assume to have been shown that which was alleged and which plaintiff now asserts is the issue on this appeal? We think it was not. The agreement shown was that embodied solely in the policy announced by Seagram. No policy was ever announced by Calvert other than that it would follow the Seagram policy. The latter's policy as well as the reason therefor is clearly and unmistakably shown by Seagram's telegram (heretofore quoted) sent to wholesale liquor dealers, dated November 6, 1946. That policy was "to maintain former OPA prices on all brands," with the request that the wholesalers support "this policy of holding the price line" and that they request the retailers "not to increase prices either by the drink or by the bottle." Thus this announced policy, together with the refusal on the part of defendants to supply liquor to wholesalers who refused to recognize such policy, embraces every element of the conspiracy, agreement or concerted activity claimed to have been proven.

There is, in our opinion, a wide and fatal gap between the agreement relied upon and that shown. The defendants, as the O.P.A. had previously done, announced a maximum price policy above which their products could not be resold. This was the sole restriction which they sought to place upon the wholesalers who were all accorded the same treatment. No discrimination in this respect was directed at the plaintiff or any other wholesaler. The defendants fixed no price at which their products could or must be resold. The wholesaler was free to fix any price which it saw fit within the maximum limitation. There was no impairment upon their ability to meet a competitor's price or to sell for less. Neither were they required to sell Seagram and Calvert products at the same price.

Price fixing combinations violate the Sherman Act per se because they tend to eliminate competition. *United States v. Frankfort Distilleries, Inc.*, 324 U. S. 293, 296. The Sherman Act is intended to prevent unreasonable restraint of commerce. *United States v. Bausch & Lomb Optical Co., et al.*, 321 U. S. 707, 728. In our view, the restriction imposed by the defendants was neither in restraint of trade nor an impairment of competition. Competition, so we think, does not rest upon the ability to charge a higher price than a competitor but upon the ability to meet the price or undersell that fixed by a competitor. Bonafide competition results in benefit to the consumer in the form of lower prices. Higher prices are a detriment to the consumer and are no aid to the competitive system. The ability to sell at a lower price likewise increases the volume of goods which the consumer is likely to buy, and it is a stimulant to trade and not a hindrance. Trade, like competition, is impaired by high prices and the ability to increase prices. It is, therefore, our view that the restriction which defendants sought to place upon the wholesalers constituted no restraint on trade and no interference with plaintiff's right to engage in all the competition it desired.

That the difference between the agreement alleged and that shown is material is emphasized by plaintiff's effort to sustain the refusal of the court to instruct the jury, as requested by the defendants, that "the action of the defendants . . . directed solely towards preventing an increase in the resale prices of their products . . . was not a violation of the anti-trust laws . . ." Plaintiff argues that defendants were not entitled to this instruction be-

cause the court's instruction "clearly required the jury to determine whether or not defendants conspired to fix their resale prices," and further the plaintiff states, "The jury was not told that it could find a conspiracy to fix from the setting of a price above which defendants' products could not be sold, but it was instructed that it must find a conspiracy between defendants to fix the resale price of their products." And plaintiff's argument continues, "Therefore, the question whether a conspiracy to place a ceiling on resale prices is *illegal per se*, posed by defendants, does not arise under the court's instructions and becomes material only if there was not sufficient evidence to sustain the jury's finding under the court's instruction, as given, that defendants, conspired to fix the prices which their customers should charge."

This argument demonstrates the fallacious premise upon which plaintiff's judgment was obtained. It recognizes the distinction between an agreement to prevent an increase in the resale price of defendants' products and an agreement to fix their resale price. It was upon the latter theory that the judgment was obtained but, as we have shown, there is not a scintilla of proof of such an agreement, and if any agreement was shown it was one to prevent an increase in the resale price.

Plaintiff, however, makes the point that even an agreement to prevent an increase in the resale price was banned by the Supreme Court in *United States v. Socony-Vacuum Oil Co., Inc., et al.*, 310 U. S. 150. It is true the court used some strong and exclusive language with reference to any agreement which tampers with the price structure, but the language used must be considered in connection with the facts before the court, which the court viewed as showing combinations and agreements to raise the price and of then pegging or stabilizing the same. As the court stated (page 223), "In this case, the result was to place a floor under the market—a floor which served the function of increasing the stability and firmness of market prices. That was repeatedly characterized in this case as stabilization." Neither in that case, however, nor in any other case of which we are aware has the Supreme Court held illegal *per se* an agreement to prevent a raise of prices of manufacturer's or producer's products in the hands of a distributor.

The language of the court in the *Socony-Vacuum* case upon which plaintiff particularly relies is that (page 222),

"An agreement to pay or charge rigid, uniform prices would be an illegal agreement under the Sherman Act. But so would agreements to raise or lower prices whatever machinery for price-fixing was used." And further (page 223), "• • • a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*." In our view, none of these interdictions are applicable to the instant situation. The agreement shown did not purport to require rigid or uniform prices on the part of the wholesalers or that they raise or lower prices, and neither was it for the purpose and effect of raising, depressing, fixing, pegging or stabilizing such prices.

In view of what we have said, it becomes unnecessary to discuss or consider other issues raised by the defendants. The judgment is reversed and the cause remanded, with directions that the judgment be vacated and the cause of action dismissed at plaintiff's cost.

And on the same day, to-wit, on the ninth day of May, 1950, the following further proceedings were had and entered of record, to-wit:

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago 10, Illinois.

Tuesday, May 9, 1950.

Before:

Hon. J. Earl Major, Chief Judge.
Hon. Otto Kerner, Circuit Judge.
Hon. F. Ryan Duffy, Circuit Judge.

Kiefer-Stewart,
Plaintiff-Appellee,
No. 10001. *vs.*
Joseph E. Seagram & Sons, Inc.,
Seagram-Distillers Corporation,
The Calvert Distilling Company
and Calvert Distillers Corporation,
Defendants-Appellants.

} Appeal from the
United States District Court for the
Southern District
of Indiana, Indianapolis Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Reversed, with costs, and that this cause be, and the same is hereby, remanded to the said District Court with directions that the judgment be vacated and the cause of action dismissed at plaintiff's cost.

And afterward, to-wit, on the twenty-fourth day of May, 1950, there was filed in the office of the Clerk of this Court a petition for rehearing, which said petition is in the words and figures following, to-wit:

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

No. 10001.

Kiefer-Stewart, Plaintiff-Appellee, vs. Joseph E. Seagram & Sons, Inc., Seagram-Distillers Corporation, The Calvert Distilling Company and Calvert Distillers Corpora- tion, Defendants-Appellants.	}
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PETITION FOR REHEARING.

Kiefer-Stewart Company, the plaintiff-appellee, hereby petitions the Court for a rehearing of the above-entitled cause for the following reasons and upon the following grounds, viz.:

I.

The Court erred in holding that the evidence failed to show that Seagram and Calvert acted in concert or combination, or as a result of conspiracy.

1. The Court refused to accord to the verdict the benefit of inferences which reasonably and logically could be drawn from all of the evidence; and, conversely, the Court weighed the evidence and drew inferences contrary to the verdict from isolated portions of the evidence, which inferences obviously had been rejected by the jury.

2. The evidence clearly showed: (i) Identical action on the part of Seagram and Calvert (but of no other distillers) in making identical resale price de-

mands on Indiana wholesalers and in enforcing such demands by coercion, and later by Fair Trade contracts; (ii) Identical treatment by defendants of plaintiff by termination of both its Seagram and Calvert distributorships, despite plaintiff's excellent record of service for Seagram and Calvert's arduous efforts to obtain plaintiff as a distributor; (iii) Close corporate affiliation of Seagram and Calvert and stock control of each by the Canadian corporation; (iv) Calvert's overnight shift of position despite repeated prior assurances to plaintiff that Calvert wanted to get into the market in a big way through plaintiff, that Calvert cared nothing about the price situation, and that Calvert would deliver goods promised (from which an inference reasonably could be drawn that someone else induced Calvert's changed attitude—and there was no distiller other than Seagram who would have had any interest in doing so); (v) Seagram alone had an obvious motive for obtaining Calvert's agreement not to sell to any wholesaler who would not sell at O. P. A. prices, because only Seagram of all distillers was attempting to dictate resale prices and if Calvert, the number two brand in popularity, had expanded its Indiana volume without an attempt to dictate resale prices, as the evidence shows it originally intended to do, the effectiveness of Seagram's coercive tactics would have been seriously impaired and Calvert undoubtedly would have enjoyed a part of Seagram's normal market; (vi) By their own admissions, Calvert and Seagram had conferences concerning the non-delivery of goods to plaintiff, but both declined to state when the conferences were held, from which the inference reasonably could have been drawn that such conferences were held before Calvert changed its position; (vii) Both companies concurrently resumed shipments to other Indiana wholesalers when new price filings were made in February, but both continued to refuse to ship plaintiff, and neither even shipped merchandise contracted for and for which stamps were supplied.

Apart from the *prima facie* showing of concerted action which was established by the foregoing evidence: (viii) Two Calvert officials regretfully told plaintiff that they had to withdraw from the arrangements with plaintiff because they "had to go along with Seagram . . . the other side of the house . . . on their

sales policy," and (ix) Seagram's chief officer, Fischel, testified falsely that he had never conferred with Calvert at any time with respect to the delivery or non delivery of goods to plaintiff or to other Indiana wholesalers (from which it reasonably could be inferred, at the very least, that any revelation concerning such conferences would be damaging to Seagram).

3. Without discussing their probative force with respect to Calvert, the Court holds that Calvert's statements that it changed its policy because it "had to go along" with Seagram constitutes no proof against Seagram, despite the fact that such statements were admitted in evidence generally, Seagram having neither objected thereto nor asked for a limiting instruction. Seagram in neither of its two briefs in this Court took the position that these Calvert statements were not proof to be considered as to it—contending only that the statements did not prove a conspiracy. Moreover, there was no basis for any objection even if it had been made in the trial court, since a *prima facie* case of conspiracy was made on the balance of the evidence.

The importance of the Court's ruling on this point is such that even if there were rejected all the inferences which reasonably could be drawn from the other evidence, these two Calvert statements alone, coming from two officials of Calvert conversant with the facts, and coupled with the proof of identical conduct, certainly presented a question for the jury as to whether Calvert did not cease dealings with plaintiff and adopt Seagram's sale policy by reason of a combination with Seagram. Whether Calvert's statements were binding upon Seagram is, we submit, an issue which properly could have been raised only by Seagram and in the trial court.

4. The Court holds that neither the answers to the interrogatories, nor Fischel's involvement with them, had any probative weight, although it is conceded that if the conferences described in the interrogatories "took place early in November or about the time Calvert changed its position, some connection might be inferred." (p. 9.) But defendants were asked to state when these conferences were held, and either would or could not do so. In view of these answers and of Fischel's repeated denials that any conferences at all

were held, it certainly could reasonably be inferred by the jury in view of all of the other evidence (which the Court entirely disregards in this connection), that such conferences were held at a time pertinent to Calvert's change in position.

5. The Court erred in holding that Calvert "*for reasons of its own* decided to abandon its policy and to follow that in practice by its competitor," in the face of all the evidence and particularly the statements by Calvert officials attributing such change in policy to the fact that Calvert *had to go along with Seagram's policy*.

6. The Court erred in apparently concluding that the existence of a combination and conspiracy was disproved because Seagram had adopted its price policy, including suspension of shipments, while Calvert was actively attempting to procure plaintiff as a distributor. A conspiracy by two persons to follow and better effectuate a course of action, if otherwise illegal, is certainly not legalized by the fact that one of the parties had instituted the course of action before the parties agreed upon it.

7. The Court infers that no concert of action existed as to the sales policies of defendants because Seagram publicly proclaimed its policy on November 6, 1946, and Calvert was pursuing an independent course up to November 19, 1946. But Calvert's sudden switch on November 19, 1946, far from proving no concert of action, is in fact corroborative of the other evidence which the jury accepted as showing the existence of the conspiracy.

8. The Court invaded the province of the jury in inferring that the purpose of the conferences admittedly held between defendants was to consider means of avoiding the fancied possibility of involvement in an alleged price-fixing agreement of wholesalers.

9. The Court erroneously concluded, both in fact and law, that sales made by defendants to plaintiff, or any other Indiana wholesalers, would have presented a situation akin to that in *U. S. v. Frankfort Distilleries, Inc.*, 324 U. S. 293.

10. The Court erred in stating that plaintiff, after February, 1947, continued to sell its products at prices above the former O. P. A. level.

II.

The Court erred in holding that there was no evidence of any agreement among defendants to fix, as distinguished from an agreement to fix a ceiling upon, the resale price of their products.

1. The Court failed to refer to or consider, in connection with its statement that there was not a scintilla of proof of an agreement to fix resale prices, the effect of the Fair Trade contracts, which fixed the alleged *maximum* resale prices as the *minimum* resale prices, and which were entered into by both defendants covering all of their Indiana sales soon after their products were placed back in the Indiana market in February, 1947.

2. The Court, in holding that nothing more was involved in this case than the setting of a price above which sales could not be made, has adopted Seagram's public statement of its policy made at a particular time and has ignored the fact, established by the evidence, that the resale prices of defendants' products through their identical and combined action remained identical and constant at all times. The record shows that at the time shipments were suspended to Indiana, both defendants were on an allocation basis with their customers; thus, goods were in short supply and economic pressure was toward the increasing of prices. The fixing of *minimum* prices at that particular time under Fair Trade contracts would have meant nothing and neither defendant had such contracts (S. R. 6, 20). The fixing of resale prices from November, 1946 to February, 1947, meant fixing the *maximum* prices.

However, in March, 1947, Calvert went off allocation (R. 19); an indication of increased supply and of downward price pressure. In June, 1947, both defendants prescribed the alleged *maximum* resale prices as the *minimum* prices through Fair Trade contracts.

Therefore, even if the fact were that the O. P. A. prices were not formally specified to be *minimum* prices at a time when products could be and were being sold in the market for more (and it was therefore unnecessary so to specify them) there would be no justification for the inference that defendants did not intend to make the O. P. A. prices the absolute resale prices

for their goods, particularly when the defendants fair-traded their products and prescribed the O. P. A. prices as *minimum* resale prices as soon as there was some downward pressure on prices.

3. Since wholesalers were deprived of Calvert and Seagram products for a period of over three months because they did not sell at the former O. P. A. prices insisted upon by defendants, the inference drawn by the Court that such wholesalers were free to sell at any prices they chose below the O. P. A. prices is less reasonable than that they dared not thereafter sell at any price except that which the defendants dictated. Further, such alleged freedom to sell at a lower price, which existed only theoretically while Seagram and Calvert goods were off the Indiana market, was immediately ended upon the filing of the Fair Trade Contracts in the Spring of 1947.

III

The Court erred in construing the language of *United States v. Socony-Vacuum Oil Co., Inc.*, 310 U. S. 150, 222, 223, as not prohibiting agreements among competitors to fix and coerce price ceilings above which their products cannot be sold by their distributors.

1. The Court erred in holding in effect that the freedom of trade of dealers to charge the prices they choose for goods they own is not within the protection of the Sherman Act if the dealers are left free to sell at prices lower than those fixed and coerced by a combination of sellers.

2. The Court erred in not holding that a combination of competing suppliers has no power to fix and coerce the resale prices, whether maximum or minimum, of goods purchased by their customers.

Joseph J. Daniels,
William G. Davis,
John D. Cochran,

*Attorneys for Kiefer-Stewart
Company, Plaintiff-Appellee.*

Endorsed: Filed May 24, 1950. Kenneth J. Carrick,
Clerk.

Order Denying Rehearing.

And afterward, to-wit, on the thirteenth day of June, 1950, the following further proceedings were had and entered of record, to-wit;

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

June 13, 1950.

Before

Hon. J. Earl Major, Chief Judge.

Hon. Otto Kerner, Circuit Judge.

Hon. F. Ryan Duffy, Circuit Judge.

Kiefer-Stewart Company,
Plaintiff-Appellee,
10001 *vs.*Joseph E. Seagram & Sons, Inc.,
Seagram-Distillers Corporation,
The Calvert Distilling Company
and Calvert Distillers Corporation,
Defendants-Appellants.} Appeal from the
United States Dis-
trict Court for the
Southern District
of Indiana, Indian-
apolis Division.

It is ordered by the Court that the petition for rehearing of this cause be, and the same is hereby, denied.

And afterward, to-wit, on the sixteenth day of June, 1950, the following further proceedings were had and entered of record, to-wit;

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

June 16, 1950.

Before

Hon. J. Earl Major, Chief Judge.

Kiefer-Stewart Company, 10001 <i>Plaintiff-Appellee,</i> <i>vs.</i> Joseph E. Seagram & Sons, Inc., Seagram-Distillers Corporation, The Calvert Distilling Company and Calvert Distillers Corpora- tion, <i>Defendants-Appellants.</i>	}	Appeal from the United States Dis- trict Court for the Southern District of Indiana, Indian- apolis Division.
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On petition of counsel for the plaintiff-appellee and pursuant to stipulation of counsel, it is ordered that the issuance of the mandate of this Court in this cause be, and the same is hereby, stayed for a period of ninety (90) days from June 13, 1950.

And afterward, to-wit, on the sixth day of July, 1950, there was filed in the office of the Clerk of this Court a designation of record, which said designation is in the words and figures following, to-wit:

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

Kiefer-Stewart Company,
Plaintiff-Appellee,

vs.

Joseph E. Seagram & Sons, Inc.,
Seagram-Distillers Corporation,
The Calvert Distilling Company
and Calvert Distillers Corpora-
tion,
Defendants-Appellants.

No. 10001.

DESIGNATION OF RECORD ON PETITION FOR
WRIT OF CERTIORARI.

To the Clerk of the United States Court of Appeals for the
Seventh Circuit:

You are hereby requested to prepare and certify to the Supreme Court of the United States for use upon a petition for a writ of certiorari to be filed in said Court by Kiefer-Stewart Company, plaintiff-appellee in the above-entitled cause, a transcript of the record and proceedings in the above-entitled cause in the United States District Court for the Southern District of Indiana, and of the proceedings in the United States Court of Appeals for the Seventh Circuit, as follows:

1. Printed Transcript of Record filed in the United States Court of Appeals for the Seventh Circuit on August 31, 1949, and printed Supplemental Transcript of Record, filed December 28, 1949.
2. Entry of December 28, 1949, showing filing of stipulation re omissions in record.
3. Opinion of the Court, filed May 9, 1950.
4. Judgment of the Court, entered May 9, 1950.
5. Entry of May 24, 1950, showing filing of petition for rehearing.

6. Petition for rehearing filed May 24, 1950, excluding the annexed brief.
7. Order entered June 13, 1950, denying petition for rehearing.
8. Entry of June 16, 1950, staying issuance of mandate.
9. This designation of record.

William G. Davis,
Attorney for Kiefer-Stewart Company,
Plaintiff-Appellee.

Baker & Daniels,
Of Counsel.

We acknowledge service of the foregoing Designation of Record on Petition for Writ of Certiorari, this 5th day of July, 1950.

Davis, Baltzell, Hartsock & Dongus,
By Paul Y. Davis.

Endorsed: Filed Jul. 6, 1950. Kenneth J. Carrick,
Clerk.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of papers filed and proceedings had, made in accordance with the designation of record, filed July 6, 1950, in:

Cause No. 10001.

Kiefer-Stewart Company

vs.

Joseph E. Seagram & Sons, Inc., et al.,

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this 26th day of July, A. D. 1950.

Kenneth J. Carrick,
*Clerk of the United States Court of
Appeals for the Seventh Circuit.*

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950

No. 297

ORDER ALLOWING CERTIORARI—Filed October 23, 1950

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Minton took no part in the consideration or decision of this application.

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**IN THE
Supreme Court of the United States**

October Term, 1930

No. 297

Kaiser-Stoward Company, Petitioner,

**JOSEPH E. SHAWAN & SONS, INC., SHAWAN-DUTHIAS
CORPORATION, THE CALVERT DUTHIAS COMPANY AND
CALVERT DUTHIAS CORPORATION, Respondents.**

**PETITION FOR WRIT OF HABEAS CORPUS TO THE
UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT, AND BRIEF IN SUPPORT**

**JOSEPH J. DAVIES,
810 Fletcher Trust Bldg.,
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**PAUL A. FURBER,
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Washington, D. C.,
*Attorneys for Petitioner.***

**BAKER AND DAVIES,
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**ANSEL, FURBER & FURBER,
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*Of Counsel.***

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1950

No.

KIEFER-STEWART COMPANY, *Petitioner,*

v.

JOSEPH E. SEAGRAM & SONS, INC., SEAGRAM-DISTILLERS
CORPORATION, THE CALVERT DISTILLING COMPANY AND
CALVERT DISTILLERS CORPORATION, *Respondents.*

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT, AND BRIEF IN SUPPORT**

*To the Honorable, The Chief Justice of the United States,
and to the Associate Justices of the Supreme Court of
the United States:*

Kiefer-Stewart Company (hereinafter called Kiefer-Stewart), respectfully petitions that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit in this cause (R. 413), which reversed a judgment of the United States District Court for the Southern District of Indiana entered for petitioner (R. 360), and ordering dismissal of the action.

OPINION BELOW

The opinion of the Court of Appeals reversing the District Court (R. 399) is reported at 182 F. (2d) 228. The District Court judgment was entered after a jury verdict in favor of petitioner in the amount of \$325,000, exclusive of attorneys' fees. (R. 357).

JURISDICTION

This is a treble damage proceeding brought under the antitrust laws of the United States (15 U.S.C. §§ 1, 15) by complaint filed September 13, 1947. (R. 2). The judgment of the District Court was entered on June 27, 1949. (R. 360). Respondents filed notice of appeal on July 22, 1949. (R. 361). The judgment of the Court of Appeals for the Seventh Circuit was entered on May 9, 1950. (R. 413). On May 24, 1950, petitioner filed a timely petition for rehearing (R. 414), which was denied on June 13, 1950. (R. 420). Jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1254, Subdivision 1.

STATEMENT OF THE CASE

The facts as they appear from the opinion of the circuit court disclose the following:

Seagram and Calvert are leading lines of blended whiskeys on sale throughout the United States. The respondents Joseph E. Seagram & Sons, Inc. and Seagram-Distillers Corporation distill and distribute to wholesalers the Seagram line. Respondents Calvert Distilling Company and Calvert Distillers Corporation distill and distribute the Calvert line. All four companies are financially related in a way which in effect constitutes complete ownership and control by a common parent.

In the fall of 1946 the Seagram respondents adopted a policy of pegging the resale price for sales of their whiskey by wholesalers at the former O.P.A. level. Petitioner, which had been a leading wholesale distributor of the Seagram

line in Indiana, refused to fix its prices in accordance with the demand of the Seagram companies, whereupon the Seagram companies suspended all shipments to petitioner. Shortly thereafter, petitioner concluded an arrangement with the Calvert Companies to distribute their whiskies in Indiana, which involved no control by Calvert over petitioner's resale prices; and shipments of Calvert merchandise were guaranteed irrespective of the policy which had been enforced by Seagram. After the conclusion of this arrangement, conferences were held between officials of Seagram and Calvert "with reference to the delivery or non-delivery of Calvert products to Kiefer-Stewart Company." Calvert informed petitioner:

"We are going along with Seagram on their sales policy. We are terribly sorry but we have to go along with Seagram," and, "[We] have to go along with the other side of the house."

For no other reason assigned the Calvert companies announced to petitioner that they were repudiating their commitment to petitioner to furnish Calvert merchandise and they revoked petitioner's Calvert distributorship.

From that time on, the Calvert and Seagram companies pursued identical resale price policies and, early in 1947, entered into fair trade contracts with all their Indiana wholesale distributors enforcing the same minimum resale prices.

After outlining the above facts in detail, the circuit court held that such facts did not furnish a scintilla of proof of conspiracy.

"The most the proof shows," the court said, "is that Calvert for reasons of its own decided to abandon its policy and to follow that in practice by its competitor."
[182 F. (2d) 228, 232; R. 406]

The circuit court refused to attach any weight whatever to Calvert's statement to the exact contrary (admitted in evi-

dence without objection from Seagram), on the ground that no Seagram representative was present when the admission was made, or authorized such admission. Dealing with the conferences admittedly held between Seagram and Calvert for the purpose of discussing deliveries to petitioner, the court observed:

"The fact that they conferred proves nothing more than an opportunity to reach an understanding or to make an agreement. *An inference that they did so can be nothing more than a guess.*" [182 F. (2d) 228, 233; R. 407, emphasis supplied.]

As an alternative ground for reversal, the circuit court held in effect that the most that was shown by the evidence was a combination of manufacturers or suppliers to enter into a joint agreement to fix the margin of profit and the resale price for all the independent wholesalers who distributed their products, and that such a combination was lawful, provided that the result of such agreement was a temporarily lowered price to consumers.

A more detailed statement of facts as they appear in the record is as follows:

Petitioner, Kiefer-Stewart, is a wholesale drug concern. In 1946, before the acts complained of, it was the leading wholesale liquor distributor in the State of Indiana and one of the principal wholesale distributors of the Seagram line of whiskies in that state. (R. 34).

Joseph E. Seagram & Sons, Inc. (hereinafter referred to as Seagram) is the distiller of the Seagram line of whiskies. It owns all the stock of Calvert Distilling Company (hereinafter referred to as Calvert) and of Seagram-Distillers Corporation (hereinafter referred to as Seagram Sales). Calvert is the distiller of the Calvert line of whiskies. It distributes through its subsidiary Calvert Distillers Corporation (hereinafter referred to as Calvert Sales). Thus, all respondents are subject to the common control of Seagram. (R. 280-283). The four companies are the largest distillers and distributors of spirit blend whiskies both in Indiana and the United States. (R. 35).

In spite of this common control, Seagram and Calvert products have always been separately marketed under distinctive trade names. (R. 376, 390). No connection between Seagram and Calvert is disclosed in their advertising. (R. 386, 392). A principal officer of the companies testified that Seagram and Calvert are "really competitors." (R. 152).

During World War II and O.P.A. price regulation, liquor wholesalers in Indiana were held to a mark-up of 15% of cost, f.o.b. point of shipment, exclusive of new federal and state taxes which might be enacted during the war emergency (M.P.R. 445). During this period, a new Federal tax of \$3.00 per proof gallon and an Indiana state tax of \$1.00 per wine gallon were enacted. (R. 43, 284). These new taxes substantially reduced the percentage of gross profit to wholesalers. (R. 42, 284).

O.P.A. regulation of liquor prices terminated on October 23, 1946. (R. 284). Previously, petitioner had determined that upon the expiration of controls it would return to its historic pre-war practice and apply a percentage mark-up to its total costs, including the new federal and state taxes described above. (R. 42).¹ On November 1, 1946, Kiefer-Stewart made this change by filing with the Indiana Alcoholic Beverage Commission, a letter announcing this price revision. (R. 308).

Petitioner's attempt to establish its own prices and margin of profit independently was in conflict with the policy of the two Seagram companies whose policy was to fix the resale prices for its wholesale distributors. Seagram Sales

¹ The effect of O.P.A. regulation on Indiana wholesalers was not only to reduce the former 17½% mark-up to 15%, but also, concurrently with the enactment of additional federal and state taxes, to require abandonment of the established practice of applying the mark-up to total costs. This method of pricing was cumbersome and entailed difficult accounting procedures. (R. 187-188). Following decontrol, petitioner simply undertook to restore the previous method of applying the percentage mark-up to total costs, including taxes, but continued the 15% mark-up rather than the 17½% generally in effect prior to O.P.A., and additionally absorbed freight on out-of-town deliveries. (R. 42-3).

determined to force its distributors to adhere to the former O.P.A. system of pricing. (R. 201-2, 204). To achieve this end Seagram Sales sent a telegram to all its distributor-customers throughout the country stating this policy, asking for the immediate assurance of full cooperation from each distributor—not only for himself but for his customers—and information as to the steps taken by each distributor to carry out the Seagram policy. (R. 393). Seagram's vice-president and sales head testified at trial (R. 204):

“I issued instructions that anybody that raised the price of Seagram would not get any further shipments of Seagram's and if they did that, they would no longer be a Seagram distributor.”

Petitioner refused to follow the Seagram dictation. On November 6, 1946, in order to enforce this price policy, Seagram Sales suspended all shipments to petitioner. (R. 285). Despite repeated requests by Kiefer-Stewart, shipments to it were never resumed, even though petitioner later capitulated and put into effect the prices demanded by Seagram. (R. 48, 53, 84).

The Calvert companies, prior to the acts and conspiracy complained of, had been keenly interested in obtaining the services of petitioner as a distributor in Indiana. Various overtures had been made to Kiefer-Stewart from 1942 to 1946. (R. 36, 79, 107). On October 21, 1946, before petitioner announced its determination to return to its pre-war system of pricing and before Seagram had suspended shipments, Calvert Sales offered petitioner a distributorship which Kiefer-Stewart accepted on November 5, 1946. (R. 108).

After Seagram Sales had suspended shipments to petitioner, officials of petitioner and the Calvert companies met on November 12; at Calvert's request, Kiefer-Stewart arranged a large meeting of petitioner's salesmen on November 23, 1946, to introduce the Calvert line. (R. 81).

During these negotiations in early November, 1946, Calvert was fully aware of petitioner's new-price policy and Seagram's reaction to it. Calvert stated to petitioner that:

" . . . regardless of what Seagrams did in Indiana that Calvert was going through with this order with Kiefer-Stewart . . . "

" (Calvert) . . . wanted to get in the market in a big way . . . (and that this was) . . . a swell opportunity." (R. 81-82, 108).

After Seagram had suspended shipments, Kiefer-Stewart received, on November 12, 1946, assurances from the Calvert assistant general sales manager in New York that "the Seagram situation" was going to make no difference. (R. 82). Calvert's general sales manager similarly reassured petitioner (R. 39), and on November 16, 1946, Calvert filed a list of authorized wholesalers which included petitioner. (R. 298).

On November 19, 1946, the Calvert companies repudiated their agreements with Kiefer-Stewart, and notified petitioner that they would make none of the agreed shipments. (R. 40).

There is substantial additional evidence that the suspension of Seagram shipments and the refusal of Calvert to go through with its commitments to petitioner were the result of a combination and conspiracy in restraint of trade. In sworn answers to interrogatories both Calvert respondents admitted that conferences were held between principal officials of the Calvert and Seagram companies after November 6, 1946 (the date Seagram Sales suspended shipments) "with reference to the delivery or non-delivery of Calvert products to Kiefer-Stewart Company." (R. 379, 383), and Seagram Sales similarly admitted attending such conferences. (R. 392).

In notifying petitioner's president that Calvert Sales was not going through with its commitments, Calvert's sales head in Chicago stated that Calvert was:

"going along with Seagram on their sales policy. We are terribly sorry but we have to go along with Seagram." (R. 40).

Petitioner's president immediately telephoned Calvert's general sales manager who stated that Calvert would have to withdraw from the arrangement because it:

"... had to go along with the other side of the house." (R. 41).²

After the repudiation of the arrangements with petitioner the Seagram and Calvert companies pursued identical policies with respect to resale prices, ostensibly to reduce prices to consumers. However, in 1947 when supplies were more plentiful, they entered into fair trade contracts with all their Indiana wholesalers fixing identical *minimum* prices, thereby abandoning the pretense that their purpose was to lower prices to consumers. (R. 105, 285-9).

As a further matter, although Seagram claimed to be "holding the price line", it simply cheapened the quality of its product—thus receiving a price pegged by Seagram and Calvert together for less valuable liquor. This was done by adding a greater proportion of younger whiskies to the blend. (R. 211-12).

The District Court submitted the case to the jury on the issue whether the respondents had conspired to fix the resale prices for their products. (R. 267, 71). The jury found for plaintiff, assessing damages at \$325,000. (R. 357). The court entered judgment trebling the damages and allowing \$50,000 attorneys' fees, making a total judgment of \$1,025,000.00. (R. 360-1).

² The Seagram companies occupy space on the south side of the Chrysler Building in New York City; Calvert has space on the north side of the same floors. (R. 41).

OPINION OF THE UNITED STATES COURT OF AP- PEALS FOR THE SEVENTH CIRCUIT.

The decision of the Seventh Circuit reversed the judgment of the District Court and remanded the cause with directions that the judgment be vacated and the cause of action be dismissed at petitioner's cost [182 F. (2d) 228, 236; R. 412].

This was based on two grounds:

1. That the evidence was not sufficient to support a finding by the jury that a combination or conspiracy existed.
2. That assuming the combination and conspiracy proved, such a conspiracy was only one to depress or to prevent an increase of prices, and, as such, was not a violation of the antitrust laws.

The standards of proof adopted by the court below would render it practically impossible to establish a case of conspiracy in restraint of trade, unless a plaintiff should be fortunate enough to discover written agreements between the conspirators detailing their unlawful activities.

The opinion went far towards repudiating the doctrine of this Court as established in *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, condemning as unlawful *per se*, agreements to "raise or lower prices".

QUESTIONS PRESENTED.

1. Whether it is lawful under the antitrust laws for competing manufacturers and distributors in interstate commerce to combine and control the margins of wholesale profit by enforcing maximum or ceiling prices to which all the wholesalers of their products must conform.
2. Whether an appellate court should be permitted to reject the verdict of a jury finding the existence of a combination or conspiracy in violation of the antitrust laws based upon such facts as identical action taken by two competing sellers under common control in fixing and coercing absolute or even maximum resale prices.

together with sworn statements on the part of such competitors that conferences between them were held concerning such concert of action and admissions by one of them that the identical action was taken due to pressure exerted by the other members of the conspiracy.

SPECIFICATION OF ERRORS.

1. The Court below erred in holding that a conspiracy between competing sellers under common control to fix maximum resale prices is not a violation of the antitrust law.
2. The Court below erred in setting aside a jury verdict finding a conspiracy in restraint of trade.
3. The Court below erred in setting aside a finding, implicit in the jury verdict, of conspiracy to fix absolute resale prices.
4. The Court below erred in refusing to give any weight to statements of a co-conspirator admitted without objection or limitation.

REASONS FOR GRANTING THE WRIT.

1. A question of far-reaching importance is presented by the circuit court's ruling that a combination to fix and coerce resale prices at temporarily lower levels than would result from a competitive market is not in violation of the antitrust laws. This is a novel doctrine. It is based upon the notion that a combination of suppliers to fix prices, which combination the court believes to be of temporary advantage to consumers, is not a restraint of trade no matter how much merchants dealing with the combination are damaged or the extent to which their previous margins are squeezed. This doctrine would substitute the judgment of a court as to the consumers' interest, for the free market place; it would leave out of account the interests of independent merchants and would give to large combinations the powers of a private Office of Price Administration without any responsibility to the public.

This novel principle announced by the court, if permitted to stand, would open a Pandora's box of new problems in the administration of the antitrust laws. In effect the circuit court has said that a combination of manufacturers can meet and determine what margin of profit the independent businesses who market their products shall have. If the combination is large enough to control an advertised product which the distributor must have to maintain his reputation and good will, the court's decision gives unlimited opportunities to the members of that combination to exploit both wholesalers and retailers. It may compel them to sell at no margin of profit, or even at a loss.

Control of prices is a delicate and dangerous undertaking. The economic effects may well be disastrous unless both the price to the consumer and the margin of profit to the distributor are considered and carefully weighed. Both of these factors are always considered under governmental systems of price control set up in emergency periods. In the absence of price controls the courts are certainly not delegated the power to pass upon the economic benefits of a private combination which regulates the margin of profit of the independent businessmen who distribute its goods.

To delegate to a combination of private companies the power to fix prices was held unconstitutional even where the prices were investigated and approved by a government agency in *Schechter Poultry Corp. v. U.S.*, 295 U. S. 495. It is true that during the N. R. A. period it was thought of economic benefit to raise prices and increase margins of profit. Here the court appears to think it is of economic benefit to lower margins of profit. The decision of such problems cannot be constitutionally delegated to private groups on the assumption that their motives will be laudable and that they will act in the public rather than their own private interest.

The record in this case destroys the circuit court's illusion that consumers actually benefit by private price-fixing combinations that claim to act in their interest. It shows that the so-called "maximum" price set by respondents

became in July 1947 the "minimum price", pursuant to fair trade contracts simultaneously executed by all respondents with their Indiana distributors. This affords proof not only that the respondents fixed the absolute price for their goods by concerted action, but illustrates the ease by which a temporarily lowered price, fixed by agreement, can quickly or gradually become a higher price than competition would create. It shows how such a price-fixing combination can be utilized to obtain effective control of the business of its formerly independent distributors. Certainly a federal court has neither the machinery nor the omniscience to decide all of the problems implicit in the application of the principle that combinations to lower prices are not in violation of the antitrust laws.

The confusion which this novel interpretation puts upon principles firmly established by the Supreme Court is illustrated by the following comment in the United States Law Week (18 L.W. 1181, May 30, 1950):

"An important limitation may be placed upon the definition of illegal price-fixing agreements set forth in the Supreme Court's decision in the *Socony-Vacuum* case, 310 U. S. 150, if a ruling of the Court of Appeals for the Seventh Circuit is upheld. The court holds that an agreement among manufacturers to fix a maximum markup percentage for use by wholesalers purchasing their products for resale is neither in restraint of trade nor an impairment of competition Pointing out that price-fixing combinations violate the Sherman Act because they tend to eliminate competition, the court decides that maximum price limitations are legal . . ."

2. Should the techniques of appellate review adopted by the court below be sanctioned, it would be virtually impossible for a plaintiff to prove a conspiracy in violation of the antitrust laws. Corporations which have had experience with the antitrust laws have learned to leave few, if any, tracks. The court below requires that gentlemen of the conspiratorial trade should be surprised with their pointed

caps together.³ This should not be and has not been the law, until the decision below. To reject compelling or even telling inferences of conspiracy and further to expand the hearsay rule beyond any previously sanctioned limit, not only involves a marked departure from the historic function of a reviewing court, but would constitute a judicial repeal of the antitrust laws.

BRIEF IN SUPPORT OF PETITION.

I. The Doctrine that Any Combination or Conspiracy Between Competitors to Raise, Depress, Fix, Peg, or Stabilize Prices in Interstate Commerce is Unlawful, is a Salutary Doctrine and Should Not Be Limited.

To permit manufacturers or other sellers in interstate commerce, by agreement and by combination, to fix and coerce maximum price levels would open the door anew, as respects price agreements, to controversy over the question whether the tampering by competitors with price structures is reasonable or unreasonable, a question which has been deemed irrelevant since *United States v. Trenton Potteries Co.*, 273 U. S. 392.

In *U. S. v. Socony-Vacuum Oil Co.*, 310 U. S. 150, it was pointed out (p. 218) that for over forty (now fifty) years this Court has consistently and without deviation adhered to the principle that "price agreements are unlawful per se," (not necessarily because of their immediate adverse effect but because of their "actual or potential threat to the central-nervous system of the economy," note, p. 224). The Court said, in reversing the Seventh Circuit:

"... An agreement to pay or charge rigid, uniform prices would be an illegal agreement under the Sherman Act. But so would agreements to raise or lower prices whatever machinery for price-fixing was used ... a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se." (at 222, 223)

³ *Goldman Theatres, Inc. v. Loew's Inc., et al.*, 150 F. (2d) 738, 743 (3rd Cir. 1945).

" This blanket prescription of price-fixing agreements is grounded particularly on a recognition of the fact that those "who fixed reasonable prices today would perpetuate unreasonable prices tomorrow, since these prices would not be subject to continuous administrative supervision and readjustment in light of changed conditions." (p. 221.) It is but a corollary that maximum prices fixed today may become minimum prices tomorrow; *and in the case at bar they did become so* when the respondents shortly after the successful coercion of downward revision of resale prices to the abandoned O.P.A. level, prescribed the identical resale prices as the *minimum* resale prices for their goods. (R. 104-105.)

For still another reason, the crippling constriction by the Court of Appeals of the principles announced by this Court in *E. S. v. Socony-Vacuum Oil Co.*, 310 U. S. 150, constitutes a damaging limitation of Section 1 of the Sherman Act. Such construction is applied by the Court of Appeals to the fixing of resale prices rather than to the fixing of prices to be obtained by the conspirators themselves. Resale price agreements between sellers involve not only agreement upon prices but, of necessity, agreement upon the means to persuade or, as here, to force adoption of the agreed price by the separate customers of each.

Therefore, wholly apart from the question whether the language of this Court in *U. S. v. Socony-Vacuum Oil Co.*, 310 U. S. 150, admits of valid agreements under the Sherman Act between sellers fixing ceilings for their *own* prices, the Court of Appeals departed from the rationale of the resale price cases in *holding that competing sellers legally may combine to refuse to sell their goods to a customer of either or both* because he will not submit to their combined dictation of what *his* resale prices should be (whether maximum or minimum). Such a price-fixing combination, as here, of necessity restrains the "freedom of trade on the part of dealers who own what they sell" (*Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 373, 407-408). This agreement on price and means of coercion was clearly

“designed to take away dealers’ control of their own affairs” (*United States v. A. Schrader’s Son, Inc.*, 252 U. S. 85, 100) and was but the prelude to absolute control of price by illegal use of Fair Trade contracts. The resale price cases expressly ban such restraints which are but concrete illustrations of the natural consequences which caused this Court in *U. S. v. Socony-Vacuum Oil Co.*, 310 U. S. 150, to proscribe as illegal *per se* any tampering with price structures.

The basis for the court’s belief that conspiracy to fix prices is not a violation of the antitrust laws so long as it lowers them is found in the following naive economic dictum:

“Bona fide competition results in benefit to the consumer in the form of lower prices. Higher prices are a detriment to the consumer and are no aid to the competitive system. . . . Trade, like competition, is impaired by high prices and the ability to increase prices.”

This is like saying that the opportunity to make profits is no aid to the competitive system; that prosperity of independent businessmen and merchants who depend upon large centralized suppliers is not one of the basic necessities in creating effective purchasing power; that a system of absentee control of businesses in smaller communities by a centralized combination with power to regulate how much money these independent businesses can make is to the benefit of our economy. If the court’s economic dictum were true we should enact a perpetual O.P.A. because certainly private agencies cannot be delegated the power to control competition. As Chief Justice Hughes said in the *Schechter* case:

“The government urges that the codes will ‘consist of rules of competition deemed fair for each industry by representative members of that industry—by the persons most vitally concerned and most familiar with its problems.’ Instances are cited in which Congress has availed itself of such assistance; as, e.g., in the exercise of its authority over the public domain, with re-

spect to the recognition of local customs or rules of miners as to mining claims, or, in matters of a more or less technical nature, as in designating the standard height of drawbars. But would it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries? Could trade or industrial associations or groups be constituted legislative bodies for that purpose because such associations or groups are familiar with the problems of their enterprises? And could an effort of that sort be made valid by such a preface of generalities as to permissible aims as we find in section 1 of title 1? The answer is obvious. Such a delegation of legislative power is unknown to our law, and is utterly inconsistent with the constitutional prerogatives and duties of Congress." (*Schechter Poultry Corp. v. U. S.*, 295 U. S. 495, 537).

II. The Standards Established by the Court Below for Proof of Conspiracy in Restraint of Trade Are so Absolute as to Render Proof Impossible in the Ordinary Case.

The court below correctly stated the law in saying that, after the jury verdict, the record

"must be considered in a light most favorable to the plaintiff." [182 F. (2d) 228, 230; R. 402]

In considering the record, however, it found "not a scintilla of proof" that a conspiracy or combination among respondents existed. [182 F. (2d) 228, 232; R. 406]

It is difficult to imagine a case involving the modern business community where the proof could be more conclusive. The record shows, in brief:

1. That the Seagram and Calvert companies were financially related and controlled by a single parent;
2. That Seagram determined to fix resale prices at the previous O.P.A. levels and punished Kiefer-Stewart for refusing to adhere to its policy by suspending shipments to petitioner;

3. That Calvert, admittedly a Seagram competitor, and aware of the Seagram policy, determined to expand its distribution in Indiana through Kiefer-Stewart without any control over resale prices;
4. That conferences between officials of the two Calvert companies and Seagram Sales were held and that the question of supplying product to Kiefer-Stewart was discussed;
5. That Calvert reversed its position towards Kiefer-Stewart and refused shipments unless Kiefer-Stewart would adhere to the identical resale price policy demanded by Seagram;
6. That Calvert told Kiefer-Stewart that the reason for its withdrawal from the arrangement was that it "had to go along with Seagrams . . . the other side of the house . . . on their sales policy.";
7. That thereafter Seagram and Calvert adopted and maintained an identical price-fixing policy, including fair trade contracts at identical prices.

The only logical inference—and the one found by the jury—is that at the conferences admitted and sworn to by respondents, it was agreed between Seagram and Calvert to fix resale prices at the previous O.P.A. level.

If evidence of this character is as a matter of law not sufficient to prove a conspiracy in restraint of trade then the former legal standards for proof of a violation of the Sherman Act have been reversed and abandoned.

Certainly this unchallenged evidence established an overall pattern of the combination or conspiracy which the jury found to exist. Far less substantial proof has frequently been deemed sufficient to establish violations of antitrust laws, since the courts have long recognized that the circumstances of conduct in this field should be considered and weighed in their entirety. This concept is well established, not as a rule of evidence, but as an indispensable instrumen-

tality in giving force and effect to the antitrust laws. These standards have been expressed in:

American Tobacco Co. v. United States, 328 U. S. 781—

United States v. New York Great A. and P. Tea Co., 173 F. (2d) 79 (7th Cir., 1949).

As stated in the *A. and P. case* at 81, the rule is:

"It needs the citation of no authority to support the proposition that if there is any substantial evidence to support the court's finding, it must be sustained. . . . We consider the case here as a whole and not piecemeal. If viewing the evidence as a whole there emerges an overall pattern of guilt as charged, the finding must be sustained."

Part of the over-all pattern of guilt, as shown by the evidence in this case, was the statement of Calvert to the petitioner that it acted in combination with Seagram to enforce adherence to the O. P. A. pricing method. To this evidence the court refused to give any weight. No rule of evidence was involved because Calvert's statement had been received without objection from either Calvert or Seagram. Under these circumstances, even if hearsay, such statements must be considered as evidence.⁴ Undoubtedly the reason for failure to object was recognition of the fact that Calvert's statement was unquestionably admissible under the co-conspirator's rule.⁵ The circuit court, however, refused

⁴ *Diaz v. United States*, 223 U. S. 442, 450; *Schlemmer v. Buffalo, R. & P. R. Co.*, 205 U. S. 1, 9.

⁵ *Winchester & Partridge Mfg. Co. v. Creary*, 116 U. S. 161; *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229; *National Ben Franklin Fire Ins. Co. v. Stuckey*, 79 F. (2d) 631 (5th Cir., 1935); *United States v. Vehicular Parking*, 52 F. Supp. 751 (D. Del., 1943).

In the *Hitchman* case, it was said:

"In order that the declarations and conduct of third parties may be admissible in such a case, it is necessary to show by independent evidence that there was a combination between them and defendants, but it is not necessary to show by independent evidence that the combination was criminal or otherwise unlawful. The element of illegality may be shown by the declarations themselves." (at 245)

to accord any probative value to the Calvert statements concerning its reasons for reversing its price policy in combination with Seagram.

It also refused to accord any weight to the previous action of Seagram, the admitted conferences between Seagram and Calvert, the subsequent reversal of Calvert's policy in order to conform to Seagram's and the final adoption of identical price policies by the two. The ruling of the circuit court, in this respect, ignored the well established rule in antitrust cases that direct testimony of the conspirators is not essential to prove a conspiracy in restraint of trade. Conspiracy may be inferred from things done showing a uniform course of conduct. Proof of a formal agreement is not required.⁶

The *Interstate Circuit* case illustrates this principle. Two circuit exhibitors of motion pictures in Texas demanded that the various distributors include certain price-fixing and other restrictions in licenses issued to all exhibitors in the Texas area. No conferences between the distributors themselves or between the distributors and the two circuits were proved. There were no admissions of conspiracy.

"The trial court drew the inference of agreement from the nature of the proposals made on behalf of Interstate and Consolidated; from the manner in which they were made; from the substantial unanimity of action taken upon them by the distributors . . ." 306 U. S. 208, 221.

⁶ *Lawlor v. Loewe*, 209 Fed. 721 (2nd Cir., 1913), aff'd 235 U. S. 522; *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U. S. 600; *United States v. A. Schrader's Son, Inc.*, 252 U. S. 85; *Frey & Son, Inc. v. Cudahy Packing Co.*, 256 U. S. 208; *Interstate Circuit v. U. S.*, 306 U. S. 208; *American Tobacco Co. v. United States*, 328 U. S. 781; *United States v. Bausch & Lomb Optical Co.*, 45 F. Supp. 387 (S. D. N. Y. 1942), aff'd 321 U. S. 707; *F. T. C. v. Beechnut Packing Co.*, 257 U. S. 441; *Shawnee Compress Co. v. Anderson*, 203 U. S. 423; *United States v. Griffith, et al.*, 334 U. S. 100; *United States v. Schine Chain Theatres, Inc.*, 63 F. Supp. 229 (W. D. N. Y. 1945); *Hoffman v. Riverside and Dan River Cotton Mills, Inc.*, 55 F. Supp. 13 (S. D. N. Y. 1944).

The Supreme Court said:

"As is usual in cases of alleged unlawful agreements to restrain commerce, the government is without the aid of direct testimony that the distributors entered into any agreement with each other . . . In order to establish agreement it is compelled to rely on inferences drawn from the course of conduct of the alleged conspirators . . ."

"We think this inference of the trial court was rightly drawn from the evidence." (306 U. S. 208, 221)

Similarly, in the *American Tobacco* case, which was a criminal suit requiring more exacting proof, the government had not a single document or other direct evidence that the major tobacco companies had conspired to depress the price of leaf tobacco, to maintain a fixed factory or wholesale price, or otherwise collectively to restrain trade. All of the courts involved, the district court, circuit court, and the Supreme Court, inferred conspiracy from uniformity of conduct.

The Supreme Court held, 328 U. S. 781, 809, 810:

"No formal agreement is necessary to constitute an unlawful conspiracy. Often crimes are a matter of inference deduced from the acts of the person accused and done in pursuance of a criminal purpose. Where the conspiracy is proved, as here, from the evidence of the action taken in concert by the parties to it, it is all the more convincing proof of an intent to exercise the power of exclusion acquired through that conspiracy. The essential combination or conspiracy in violation of the Sherman Act may be found in a course of dealings or other circumstances as well as in any exchange of words."

But, in the case at bar, the record contains not only circumstantial evidence comparable to that adduced and found sufficient in the *Interstate* and *American Tobacco* cases; but in addition, the direct evidence of Calvert's two officers that its identical action was taken because it "had to go along with Seagram", and also proof (lacking in the *Interstate* and *American Tobacco* cases) that the parties conferred with respect to the very matter upon which the conspiracy charge was based. With such proof, direct evidence of the conspiracy is available. Rare is the case where as much proof exists.

It is respectfully submitted that the rejection of the verdict of a jury finding a violation of the antitrust laws upon a record such as that presented in this case presents a dangerous precedent. To permit this decision to stand as the controlling authority in the Seventh Circuit would make it practically impossible to sustain an antitrust action in that area and would in addition create conflict and confusion by its use as a precedent in the other circuits.

CONCLUSION.

Petitioner respectfully urges the Court to issue the writ of certiorari prayed for because the decision below presents two important questions which should be reviewed, namely:

1. The limitation imposed by the court below on the doctrine that a conspiracy to fix prices is unlawful *per se*, and

2. The unwarranted standard of proof required in an antitrust action by the court below which does violence to the proper enforcement of the antitrust laws.

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IN THE
Supreme Court of the United States

OCTOBER TERM 1950.

No. 297.

KIEFER-STEWART COMPANY, Petitioner,

v.

JOSEPH E. SHAGRAM & SONS, INC., SHAGRAM-DISTILLERS CORPORATION, THE CALVERT DISTILLING COMPANY AND CALVERT DISTILLERS CORPORATION, Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the Seventh Circuit.

BRIEF FOR PETITIONER.

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IN THE
Supreme Court of the United States

OCTOBER TERM 1950.

No. 297.

KIEFER-STEWART COMPANY, *Petitioner,*

v.

JOSEPH E. SEAGRAM & SONS, INC., SEAGRAM-DISTILLERS CORPORATION, THE CALVERT DISTILLING COMPANY AND CALVERT DISTILLERS CORPORATION, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals
for the Seventh Circuit.

BRIEF FOR PETITIONER.

JURISDICTION AND STATUTES INVOLVED

This is a treble damage proceeding brought under the antitrust laws of the United States (15 U. S. C. §§ 1, 15). The judgment of the District Court was entered on June 27, 1949 (R. 360). The judgment of the Court of Appeals for the Seventh Circuit reversing the judgment of the District Court and ordering the cause remanded to the District

Court with directions that the cause of action be dismissed, was entered on May 9, 1950 (R. 413). On May 24, 1950, petitioner filed a timely petition for rehearing (R. 414), which was denied on June 13, 1950 (R. 420). The petition for certiorari was filed September 9, 1950, and was granted October 23, 1950 (R. 426). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether it is lawful under the antitrust laws for competing manufacturers and distributors in interstate commerce to combine and conspire to control the margins of wholesale profit by enforcing maximum or ceiling prices to which all the wholesalers of their products must conform.

2. Whether an appellate court should be permitted to reject the verdict of a jury finding the existence of a combination or conspiracy in violation of the antitrust laws, based upon such facts as identical action taken by two competing sellers under common control in fixing and coercing absolute or even maximum resale prices, together with sworn statements on the part of such competitors that conferences between them were held concerning such concert of action and admissions by one of them that the identical action was taken due to pressure exerted by the other members of the conspiracy.

3. Whether this Court, having the power so to do, should not finally dispose of this litigation (*Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U. S. 555) since: (i) The record presents an important question of law decided in dicta by the Court of Appeals concerning petitioner's eventual right to recover in view of the defense asserted by respondents concerning petitioner's alleged participation in a claimed separate conspiracy of Indiana wholesalers; (ii) The few remaining assignments of error present simple legal issues which may be readily disposed of by this Court; and (iii) The traditional policy of this Court is to terminate protracted litigation when, upon the record and issues presented, it is possible to achieve this end.

STATEMENT

This action was brought in the United States District Court for the Southern District of Indiana under Title 15 U. S. C., Section 15, to recover damages alleged to have been sustained by the petitioner as the result of violations by defendants of Section 1 of the Sherman Act and Section 7 of the Clayton Act (15 U. S. C., Secs. 1 and 18). The gravamen of petitioner's action was that as a proximate result of a conspiracy between the respondents Seagram and Calvert to fix the resale price of their products, the petitioner, a wholesale distributor, had been deprived since November, 1946, of a continuing supply of Seagram and Calvert whiskies and other liquors, with consequent large damage to its business. (R. 2).

The case was tried to a jury and submitted by the District Court on the issue whether the respondents had conspired to fix the resale prices for their products (R. 266-7). The court instructed the jury with respect to that issue: (i) That under the law a contract or a conspiracy to fix prices is illegal in itself as a restraint of trade and detrimental to the public interest; (ii) That if the jury found from a preponderance of the evidence that defendants entered into a conspiracy to fix their resale prices, such contract was illegal; (iii) That the jury need not consider whether prices so fixed were reasonable or unreasonable, or whether the price-fixers controlled the market, or that some desirable ends were served, but that:

"Combinations or conspiracies which fix prices constitute unreasonable restraints of trade whether for the purpose of raising, lowering, pegging or stabilizing the prices of goods sold in interstate commerce."
(R. 267)

Upon these and other instructions, and upon the evidence before it, the jury found for the petitioner, assessing damages at \$325,000.00 (R. 279), which the Court trebled in its judgment (R. 360).

Respondents appealed to the Court of Appeals for the Seventh Circuit (R. 361-362), which on May 9, 1950, reversed the judgment of the District Court, with directions that the judgment be vacated and the cause of action dismissed (R. 413).

The Parties

The respondents are Joseph E. Seagram and Sons, Inc. (referred to in the opinion below as "Seagram (Indiana)") and its wholly-owned sales subsidiary Seagram-Distillers Corporation (referred to as "Seagram Sales") and The Calvert Distilling Company (referred to as "Calvert") and its wholly-owned sales subsidiary Calvert Distillers Corporation (referred to as Calvert (Sales)).¹ Seagram (Indiana) and Calvert distill, rectify and bottle, respectively, the Seagram line of spirit-blend whiskies, (i.e., a blend of straight whiskey with neutral spirits, R. 282), including Seagram's 7-Crown, Seagram's 5-Crown and Kessler's Private Blend, and the Calvert line of spirit-blend whiskies, including Lord Calvert, Calvert Reserve and Calvert Special. (Plaintiff's Exhibits No. 5, 7, R. 77, 291, 293). Seagram (Sales) and Calvert (Sales) distribute the respective lines of spirit-blend whiskies in interstate commerce to wholesale or other outlets throughout the United States (R. 281). Since 1945, Seagram (Indiana) has owned all of the common stock of Calvert (R. 284).

Seagram and Calvert companies are the leading sellers of spirit-blend whiskies in Indiana (R. 35). They maintain their general offices on the same floor in the Chrysler Building in New York (R. 41). Despite their affiliation, Seagram and Calvert products have always been separately marketed under distinctive trade names (R. 376, 390) and no connection between the Seagram and the Calvert companies is disclosed in their advertising. (R.

¹ The opinion below also sometimes collectively refers to the Seagram defendants as "Seagram" and to the Calvert defendants as "Calvert", which designations are adopted herein.

386, 392). A principal officer of all four of the companies testified that Seagram and Calvert are "really competitors" (R. 152).

Petitioner, Kiefer-Stewart Company, is a long-established Indiana wholesale drug concern which, since its organization and except for the period of Prohibition, has been engaged in the wholesale liquor business (R. 31-32). In 1946, before the acts complained of, it was the leading wholesale liquor distributor in the State of Indiana, having a volume of liquor sales of approximately \$11,000,000, 15% or 16% of the total sales in the State (R. 34). At the time of trial (May, 1949), petitioner's sales had declined to approximately \$3,000,000, or about 6% of the State's total (R. 34).

Background of the Conspiracy.

Beginning in 1934, after Prohibition, the petitioner became a distributor for Seagram products in the State of Indiana, offered the Seagram line to every retail liquor permittee in the State of Indiana, and obtained approximately 2,400 placements in about three years, which constituted about 69% of the retail liquor permittees of the state (R. 34). By 1938, Seagram had attained leadership in the sale of spirit-blend whiskies in the State of Indiana (R. 35). Since the beginning of the war, spirit-blend sales have amounted to 80% of total whiskey sales in Indiana (R. 33). Calvert's sales volume in Indiana was less than Seagram's and, in 1942, Calvert's Indiana representative told petitioner that Calvert's distribution in Indiana was wholly unsatisfactory and sought petitioner's services as a distributor of its products in Indiana (R. 36).

World War II brought about a cessation of the distillation of grain into whiskey from October 8, 1942 until November of 1945 (R. 282). Aged whiskey inventories were in short supply and spirit-blend whiskies became increasingly important in the market (R. 33). From October 1942, Calvert Sales and Seagram Sales sup-

plied even their spirit-blend whiskies to their customers on an allocation basis (R. 282).

As the result of O. P. A. price regulation during World War II, the wholesalers' mark-up of $17\frac{1}{2}\%$ on over-all costs was reduced to a mark-up of 15% of costs, excluding from the cost basis, however, new federal and state taxes enacted after November 2, 1942. (Maximum Price Regulation 445, R. 284; R. 42). In 1944 and 1945, respectively, a new federal tax of \$3.00 per proof gallon and an Indiana state tax of \$1.00 per wine gallon were imposed (R. 43, 284). The gross profit to Indiana wholesalers on whiskey sales was reduced under this O.P.A. regulation from 13.04% to 10% on the selling price (R. 43, R. 284).

In July 1946, when it appeared that price regulation would end, petitioner determined that, upon the expiration of controls, it would return to the previous method of applying its percentage mark-up (15%) to total costs, but with an allowance of freight on out-of-town deliveries, which had not been granted when the $17\frac{1}{2}\%$ mark-up was in effect prior to O. P. A. (R. 43-4).

On October 23, 1946, O. P. A. regulation of liquor prices terminated (R. 284). The petitioner again reviewed its prior determination to apply its 15% mark-up to all costs and determined to prepare new price lists on such basis, as required by the Indiana Alcoholic Beverage Commission (R. 44). Before it had done so, on October 31, 1946, a luncheon meeting of the Indiana Wholesale Liquor Dealers Association was held (R. 44).

At the meeting, Merton A. Johnston, Trade Relations Director of the Indiana Alcoholic Beverage Commission, with a member of the Commission and a Deputy Attorney General assigned to the Commission present (R. 189), requested an opportunity to speak to the Association on the new method he wished employed in posting their prices (R. 187). He was interested in eliminating the cumbersome O. P. A. pricing method in posting prices with the

Commission (R. 187).² He wanted and asked a return to the pre-war O. P. A. method of applying a given mark-up to over-all costs, the method for which the Commission's forms had been designed (R. 187-188). Johnston also advised the wholesalers present that he would accept and approve new over-all mark-up filings made by letter announcing what the over-all mark-up was to be (R. 187). Mr. Johnston stated that the Commission wanted all of the wholesalers "to move off at the same time," and that it would not have been possible to check detailed price postings by all Indiana wholesalers at one time (R. 188).

On the same occasion, petitioner's President announced its previously determined intention to apply its existing

²The O. P. A. method of determining the wholesaler's price to retailers is illustrated by reference to Plaintiff's Exhibit No. 5 (R. 77, 291, 285-6). The Seagram (Indiana) price filing shows the following with respect to a case of Seagram 7-Crown (4/5):

F. O. B. Distilling price, including Federal Tax ..	\$30.08 (Col. 1)
Freight35 (Col. 2)
State Tax	5.00 (Cols. 3 and 4)

Wholesaler's Cost	\$35.43 (Col. 5)
-------------------------	------------------

In order to arrive at the retailer's cost (Col. 6) it is necessary to:

- (a) Deduct \$3.00 per 100-proof gallon
(the Federal Tax increase) = 2.4 gal.
(no. wine gal. per case of 4/5) x \$3.00
(Fed. increase) x 86.8% (proof) ... \$6.25
- (b) Deduct \$1.00 per wine gallon (Indiana Tax increase) = 2.4 gal. (no. wine gal. per case of 4/5) x \$1.00 (Ind. increase) ... 2.40 = -8.65

Wholesaler's Cost exclusive of Tax Increases	\$26.78
--	---------

And to:

Add 15% mark-up (26.78 x .15)	4.02
Add deductions from cost a/e tax increases	8.65

Wholesaler's Price to Retailers	\$39.45 (Col. 6)
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15% mark-up to its over-all costs (R. 47-8), and petitioner on November 1, 1946, filed a letter with the Indiana Alcoholic Beverage Commission stating such intention (Defendants' Exhibit No. 8, R. 166, 308). Other wholesalers filed similar letters (Defendants' Exhibits 1-22, R. 163-166, 299-307, 309-322).

Petitioner's change in its own mark-up, however, came in conflict with a policy decided upon by Seagram (Sales) as to the prices to be charged by its customers. Fischel, Vice President of Seagram (Sales), shortly before O. P. A. regulation expired, decided that the distributors of Seagram products should adhere to the former O. P. A. system of pricing (R. 201-2, 204). To achieve this end Seagram (Sales) sent a telegram to all its distributor-customers throughout the country stating this policy and asking the immediate assurance of full cooperation from each distributor—not only for himself but for his customers—and information as to the steps being taken by each distributor to carry out the Seagram policy (R. 393). Fischel testified at the trial that they did not insist after O. P. A. went out of existence that customers use the same price, but later said (R. 204):

“I issued instructions that anybody that raised the price of Seagram would not get any further shipments of Seagram's and if they did that, they would no longer be a Seagram distributor.”

Petitioner had already filed its intention to change prices, effective November 6, 1946, and refused to follow the Seagram dictation. Since the latter part of October, 1946, the petitioner has not received any shipments of Seagram whiskies (R. 48).

On October 22, 1946, at a convention of the Indiana wholesalers at French Lick, Indiana, Calvert again (as in 1942 and 1943) offered petitioner a Calvert distributorship (R. 37, 79-80, 107). Calvert offered a thousand cases a month, as a starter with an increased supply promised as

soon as it could be obtained (R. 37-38, 108). The petitioner did not accept the proposition thus made but expressed its interest if Calvert could obtain additional merchandise (R. 80, 108).

On November 5, Calvert representatives arranged another meeting with petitioner with reference to a distributorship of Calvert products (R. 80, 108). At this meeting, Calvert stated that it had been able to obtain 2,000 cases of Calvert merchandise a month if petitioner would go along; and petitioner stated its willingness to become a distributor if Calvert could increase the amount within a short period (R. 80-81, 108). At this meeting, the pending price change by petitioner was discussed and Calvert's Division Manager Schwalb stated that the price change would have no effect on Calvert shipments of merchandise. "He said that regardless of what Seagrams did in Indiana that Calvert was going through with this order with Kiefer-Stewart due to the fact that they wanted to get in this market in a big way and this was their opportunity." (R. 108, 81)

On November 12, the same Calvert representatives again met with representatives of petitioner. Calvert requested that petitioner arrange, and petitioner did arrange, a large meeting of petitioner's salesmen and Calvert executives on November 23, 1946, to introduce the Calvert line, by which time Calvert merchandise was to have been delivered to petitioner (R. 81, 109). At this meeting, the subject of the suspension of Seagram shipments to Indiana was brought up, and Calvert's Indiana Manager stated to petitioner that "they were still wanting to go along." (R. 82) Mr. Gollin, Assistant General Sales Manager of Calvert, was called on the telephone, and told petitioner that

" . . . the Seagram situation was going to make no difference. He was going to personally guarantee that the merchandise would be out here and for us to go along and make arrangements for the sales meeting." (R. 82).

Under date of November 13, 1946, Calvert (Sales) executed an official form of the Alcoholic Beverage Commission designating its authorized distributors in Indiana, and required to be signed by an official authorized to bind the company. Such list of distributors, including the name of petitioner, was stamped as received by the Auditing Department of the Indiana Alcoholic Beverage Commission on November 16, 1946. Petitioner's name was stricken out, presumably at some later date (Plaintiff's Exhibit No. 10, R. 78, 297-298).

The Conspiracy Found by the Jury

On November 19, 1946, the Calvert companies notified petitioner that they would not make any shipments of Calvert products to petitioner (R. 39-40). In notifying petitioner's President that Calvert was not going through with its commitments, Calvert's Division Manager in Chicago, who had negotiated the arrangements just one week before, stated that Calvert was:

" * * * going along with Seagram on their sales policy. We are terribly sorry but we have to go along with Seagram." (R. 40)

Petitioner's President immediately telephoned Calvert's General Sales Manager in New York, who stated that Calvert would have to withdraw from the arrangement because it:

" * * * had to go along with the other side of the house." (R. 41)

The two Calvert officials denied these admissions (R. 221, 240), and even claimed that petitioner's President was neither told nor did he ask why Calvert was calling off the deal (R. 221).

In sworn answers to interrogatories, addressed to Seagram and Calvert, they admitted that they had, between November 6, 1946 and February 3, 1947, conferred with

respect to the delivery or non-delivery of products to petitioner (R. 379, 383, 391-2). Such sworn answers designated the persons so conferring as Samuel and Allen Bronfman of the Canadian parent corporation (Distillers Corporation-Seagram, Ltd.), Fischel of Seagram (Sales), Schwengel of Seagram (Indiana), Wachtel and Reznik of Calvert, and Friel, an officer of all four respondents, but stated that the respondent was unable to give any specific dates of any such conferences (R. 379, 383, 391-2).

Fischel, the first of respondents' officials to testify, repeatedly denied on the witness stand that he had ever discussed with Calvert the matter of deliveries of whiskey to Indiana or to petitioner, or that he even knew that Calvert had not shipped when the suit was filed (R. 208-210). This denial continued even when the witness was confronted with the sworn answers to interrogatories of his company to the contrary (R. 209, 213). Later he returned to the stand and claimed that by his previous unqualified denials he had intended to refer to conferences before November 6, 1946, and that he had a single conference with Friel, a common officer of Seagram and Calvert. Calvert's President thereafter testifying took the position that if Friel's sworn answer for his company said there were conferences "before the act" he would repudiate it, but that if he said they were "after the act" he would accept it—that conferences were "not necessary" before because he decided his own policy; that Seagram and Calvert "don't discuss their policies" but "exchange information" after the act (R. 232-33).

Calvert's President further testified that Calvert withheld shipments to Indiana until wholesalers maintained the prices at which they had previously sold "which was the established price and had been for years" (R. 231-2). Seagram (Indiana's) President, while shipments were being suspended to petitioner, stated to petitioner that Seagram (Indiana) was insisting on sales at no other price than the O. P. A. price (R. 68). Seagram (Sales) Indiana

representative testified that Seagram was not going to ship any liquor into Indiana until all distributors "went along with our program." (R. 196)

On February 3, 1947, Fischel of Seagram held a meeting with certain Indiana wholesalers whom he had invited to Chicago, the group being limited to those who had filed new prices, presumably acceptable to Seagram (R. 84). Petitioner was not invited to the meeting but the head of its liquor department, Lutz, attended on instructions of petitioner's President (R. 99). Immediately after such meeting—when "the distributors here finally saw the light of day" (R. 254)—the Calvert and Seagram companies commenced shipping their whiskey to other Indiana wholesalers but neither Calvert (Sales) nor Seagram (Sales) ever thereafter shipped any of their products to the petitioner (R. 205, 243-4), but continued to boycott petitioner after they had resumed relations with all other Indiana wholesalers.

Seagram and Calvert each adopted an allocation system during the war years, while their products were in short supply (R. 199, 282). This quota arrangement was abandoned by both respondents when supplies became more abundant in 1947 (R. 208, 282). This change of sales policy coincided in general with the action taken by Seagram and Calvert in making fair trade contracts with Indiana wholesalers. These contracts required that wholesalers maintain minimum resale prices which were specified in price schedules concurrently filed with the Indiana Alcoholic Beverage Commission (Plaintiff's Exhibits Nos. 3-7, R. 76-77, 287-294).

These schedules fixed as the minimum resale prices the identical prices which respondents had insisted upon as the maximum prices in November of 1946. Thus the maximum of November, 1946 became the minimum after shipments were resumed in 1947. An inspection of the Seagram and Calvert schedules reveals that these respondents have followed identical pricing policies from the distillery

through to the consumer, with respect to their principal products. The prices of Seagram's 7-Crown and Calvert's Reserve, their more expensive lines, are identical, as are the prices on their cheaper lines, Seagram's 5-Crown and Calvert's Special (R. 291, 293).

THE OPINION OF THE COURT OF APPEALS.

The opinion of the Court of Appeals is officially reported at 182 F. (2d) 228 and appears in the record at page 399. It held (i) that the evidence was not sufficient to show that the respondents "acted in concert or as a result of conspiracy" (R. 409); (ii) that, even assuming that respondents acted in concert, their agreement amounted only to a determination of a maximum price above which their products could not be resold, with the wholesaler being "free to fix any price which it saw fit within the maximum limitation" (R. 410); and (iii) that the restriction thus imposed by respondents was not in restraint of trade and that the language of this Court in *U. S. v. Socony-Vacuum Oil Company, Inc.*, 310 U. S. 150, condemning, as illegal *per se*, agreements "to raise or lower prices" and "a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging or stabilizing the price of a commodity," constituted *dicta* under the facts of that case and was inapplicable to this cause. (R. 411-412).

SUMMARY OF ARGUMENT.

I. The Court of Appeals erred in holding that there was not sufficient evidence, by inference or otherwise, to prove that Seagram and Calvert acted in concert or combination; and in holding, to the contrary, that the evidence indicated they each pursued an independent course [182 F. 2d at p. 234 (R. 404)].

The proof showed: close corporate affiliation between respondents; that Seagram determined to maintain former O.P.A. prices after the termination of price control and punished petitioner for refusing to adhere to such prices

by suspending shipments; that Calvert, admittedly a Seagram competitor and aware of the Seagram price policy, determined to expand its Indiana distribution with petitioner as a distributor, without any indicated desire to control petitioner's resale prices; that conferences were held between Seagram and Calvert at which the question of supplying products to petitioner was discussed; that Calvert over-night reversed its attitude toward petitioner, by suspending shipments and canceling petitioner's newly awarded distributorship, giving as the reason that it "had to go along with Seagrams—the other side of the house—on their sales policy" (R. 40-41); that Seagram and Calvert, in February, 1947, resumed shipments to other Indiana wholesalers when the latter filed new prices at the former O.P.A. level, but both continued to boycott petitioner, and, thereafter in 1947, both Seagram and Calvert continued their identical price policies by putting in force fair trade contracts, with identical price structures on their comparable brands, adopting as the minimum prices required to be charged by their customers the maximum prices insisted on in November, 1946. *

Thus the evidence showed (i), an identical course of conduct, (ii) opportunity to have agreed thereon at conferences admittedly held, (iii), motive, in Seagram's need for enlisting aid in enforcing dictation of resale prices, and (iv), admissions by Calvert that it had "to go along with Seagram . . . on their sales policy." This quantum of proof of concerted action far exceeded that usually available in conspiracy actions, and in holding it insufficient, the court below invaded the historic province of the jury and adopted a standard of proof so rigid that, if approved, it would be virtually impossible to prove a conspiracy in restraint of trade. Further, the court below committed a palpable error of law in holding that Calvert's announced reasons for its refusal to deal with petitioner, even though not objected to nor sought to be limited by Seagram, was not proof of combination against Seagram.

II. The Court of Appeals erred in holding that the conspiracy to fix resale prices found by the jury did not violate the antitrust laws, because it was a combination only to fix maximum prices for the resale by wholesalers of respondents' liquor. (182 F. 2d at pp. 235-6, R. 411-12.)

Even assuming that the only agreement shown between respondents was one to fix and coerce the adoption of maximum resale prices, the Seventh Circuit erred in holding such a combination to be lawful. The Court disregarded as *dicta* what it described as the "strong and exclusive language with reference to any agreement which tampers with the price structure," used by this Court in *United States v. Socony-Vacuum Oil Co., Inc., et al.*, 310 U. S. 150, and put a crippling constriction on the following principles announced in that case (p. 222-3):

"An agreement to pay or charge rigid, uniform prices would be an illegal agreement under the Sherman Act. But so would agreements to raise or lower prices whatever machinery for price fixing was used . . . a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se."

The sanction of approval given by the court below to maximum price agreements applies not only generally to agreements among sellers upon their own prices but, in the case at bar, applies to the resale prices of their customers—which means that competing sellers would be free to agree not only upon resale prices but upon the means to enforce their adoption by the separate customers of each. Such a price-fixing combination not only involves the mutually agreed restraint of the sellers but also a restraint upon "the freedom of trade on the part of dealers who own what they sell" (*Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 373, 407-8), "designed to take away dealers' control of their own affairs" (*United States v. A. Schrader's Son, Inc.*, 252 U. S. 85, 100). This freedom of trade

of dealers and the right to control their own affairs comes under the aegis of the doctrine that price-fixing is illegal *per se*.

Wholesalers and other distributors in the vertical line of commerce in a commodity have no means of protecting themselves against changing or rising costs if dominant competing producers are free to combine in order to fix and coerce absolute or maximum resale prices. The basis of the Seventh Circuit's contrary holding is that higher prices are always a detriment to the competitive system; which is to say that the survival of independent merchants is not essential in a healthy merchandising structure, and that absentee control by centralized combinations with power to regulate the profits of local businesses is in the public interest. Even if the Court's economic diction were true that trade is always "impaired by high prices and the ability to increase prices" (R. 410), under our system only a public and not a private O.P.A. could be vested with the power to set maximum prices. (See: *Schechter Poultry Corp. v. U. S.*, 295 U. S. 495, 537.)

The blanket proscription of price-fixing is grounded on recognition that those "who fixed reasonable prices today would perpetuate unreasonable prices tomorrow, since these prices would not be subject to continuous administrative supervision and readjustment in light of changed conditions" (*U. S. v. Socony-Vacuum Oil Co.*, 310 U. S. at p. 843). In this case, there is substantial evidence, disregarded by the court below, that the maximum resale prices prescribed by respondents in October 1946 were in fact absolute prices. Supplies were then scarce and fixing a ceiling on resale prices was equivalent to fixing the floor. But soon after respondents resumed shipments to Indiana in 1947, they filed fair trade contracts with all their customers, thereby perpetuating the former ceiling prices as minimum prices. Moreover, the prior coercion practiced in suspending shipments and canceling distributorships would itself have discouraged any deviation in price by the wholesalers, thus rendering illusory the freedom "to fix any prices within

the maximum limitation," cited by the court below. (R. 410.) The proof also showed that respondents had an established price for years (R. 232), and that they wished to maintain that price structure (R. 231). Upon this evidence which sustained the jury's finding of a conspiracy to fix resale prices, the limitation sought to be placed by the court below upon the "strong and exclusive" language of this Court in the *Socony-Vacuum* case was particularly unwarranted.

III. This Court granted certiorari, without limitation, on the questions presented and errors assigned in the petition for certiorari. Such questions and assigned errors included all of the issues expressly decided by the Court of Appeals. A decision by this Court on such questions, if error should be found, would not dispose of this litigation and would leave undecided one question of public importance, independently warranting review by this Court. The opinion of the Court of Appeals in dicta decided this issue (relating to a defense based on an alleged violation by plaintiff of the antitrust laws).

This Court has the power to decide the entire case upon the record before it (*Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U. S. 555) and we ask that the Court exercise that power to decide this important public question and, by disposing of other minor assignments of error, terminate this litigation by reinstatement of the judgment of the District Court.

Respondents assigned error by the District Court in the following portion of its instructions to the jury:

"I might say at this time that it is no defense to this action, even though the plaintiff and the other wholesalers entered into a conspiracy among themselves, that would be no defense to this action, if the defendants entered into the conspiracy charged in the complaint." (R. 264.)

In effect, the instruction tells the jury:

1. That the motivation of defendants who have combined to fix prices is immaterial. Here the claim was that the respondents, believing that petitioner had conspired with other wholesalers, had the right and the duty to combine and conspire to police the industry and to refuse to sell to those who were not obeying the antitrust laws.

2. That a treble damage action is not barred by the equitable doctrine of "clean hands," if the plaintiff is shown to be engaged in an independent conspiracy with others, not parties to the action, to violate the antitrust laws in connection with the product which he is purchasing from the defendants.

The instruction was correct as a matter of law on both points. The contrary view on the first point, which the Court of Appeals approved, would mean that competing manufacturers or producers could successfully defend against antitrust violations by asserting that they were policing the distribution of their products against violations of the antitrust laws and, therefore, could with impunity conspire to the injury of their victims. The police power under the antitrust laws is vested in administrative agencies and the courts, and such power cannot be delegated to combinations of private individuals, so as to permit them to cloak their illegal actions and the injury caused thereby under an immunity of law. The same historic defense of beneficent purpose has been repeatedly considered immaterial by this Court.

As to the second point, both on principle and precedent, it is clear that the doctrine of "clean hands" does not place a plaintiff who violates the antitrust laws beyond the pale of the legal protection afforded to him by such laws. *Bruce's Juices v. American Can Co.*, 330 U. S. 743, *A. B. Small Co. v. Lamborn & Co.*, 267 U. S. 248, *Wilder Mfg. Co.*

v. Corn Products Refining Co., 236 U. S. 173, *Connelly v. Union Sewer Pipe Co.*, 184 U. S. 546.

The additional assignments of error relate to other instructions and admission of evidence. The short discussion of these assignments herein contained shows both that they are groundless and of insufficient importance to constitute reversible error.

ARGUMENT

I

THE COURT OF APPEALS ERRED IN REVERSING THE JUDGMENT OF THE DISTRICT COURT ON THE GROUND THAT THERE WAS NOT SUFFICIENT EVIDENCE OF COMBINATION AND CONSPIRACY ON THE PART OF THE DEFENDANTS TO GO TO THE JURY.

The finding implicit in the verdict of the jury that the defendants conspired to fix the resale prices of their products was supported by substantial evidence and the court below erred in holding to the contrary. The ultimate issue of fact which was left to the jury by the instructions of the District Court was whether or not the defendants had entered into a contract or conspiracy to fix the resale prices of their products and whether plaintiff was damaged by this conspiracy (R. 267). The jury returned a general verdict for plaintiff (R. 279).

It is difficult to imagine a case involving the modern business community where proof of conspiracy could be more conclusive. As stated above, the record shows, in brief:

(1) That there was close corporate affiliation between the Seagram and Calvert companies, including stock ownership of Calvert by Seagram (Indiana);

(2) That Seagram determined to fix resale prices at the previous O. P. A. levels and punished the peti-

tioner for refusing to adhere to its policy by suspending shipments;

(3) That Calvert, admittedly a Seagram competitor, and aware of the Seagram policy, determined to expand its distribution in Indiana through petitioner, without any control over resale prices;

(4) That conferences between officials of Calvert and of Seagram were held, and the question of supplying products to petitioner was discussed;

(5) That Calvert over-night reversed its attitude toward the petitioner and refused shipments, despite repeated prior statements to petitioner that it wanted to "get into the Indiana market in a big way," through petitioner, and despite its previous disinterest in petitioner's prices and repeated assurances that it would fulfill its commitments;

(6) That Seagram and Calvert (but no other distiller) (R. 193, 196) made identical resale price demands on Indiana wholesalers, and enforced such demands by identical coercion in the form of suspension of shipments and cancellation of distributorships;

(7) That Seagram and Calvert in an identical manner terminated petitioner's distributorship, despite petitioner's long and excellent record of service for Seagram and Calvert's arduous efforts, newly successful, to obtain petitioner as a distributor;

(8) That Calvert told the petitioner that the reason for its withdrawal from the arrangement was that it "had to go along with Seagrams—the other side of the house—on their sales policy";

(9) That Seagram and Calvert concurrently resumed shipments to Indiana wholesalers, other than petitioner, when new price filings were made in February 1947, both, however, continuing to boycott petitioner; and

(10) That, thereafter, Seagram and Calvert continued their identical price policies by executing and filing fair trade contracts, with identical price structures on comparable brands.

In ignoring the above facts and the inferences which the jury drew from them, the Seventh Circuit in the opinion below adopted a standard of proof so rigid that, if followed, it would become virtually impossible to prove the existence of a conspiracy in restraint of trade. In so doing, the court below also disregarded the established law with respect to setting aside jury verdicts.

An appellate court should reverse a jury verdict only where it is "clearly erroneous". In *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U. S. 359, 375, it was said:

"And, although there was no direct evidence—as there could not well be—that the defendant's refusal to sell to the plaintiff was in pursuance of a purpose to monopolize, we think that the circumstances disclosed in the evidence sufficiently tended to indicate such purposes, as a matter of just and reasonable inference, to warrant the submission of this question to the jury . . . And the weight of the evidence being in such case exclusively a question for the jury, its determination is conclusive upon this question of fact."

The Court of Appeals correctly stated the standard by which a jury verdict should be tested on appeal, saying (R. 402):

" . . . that it (the proof) must be considered in a light most favorable to the plaintiff, and that the plaintiff is entitled to all reasonable inferences which may be deduced therefrom."

Professing to apply such standard, the Court of Appeals concluded from its interpretation of the evidence upon which the jury verdict was based that (R. 406):

"The most the proof shows is that Calvert for reasons of its own decided to abandon its policy and to follow that in practice by its competitor. There is not a scintilla of proof that this shift in the position of Calvert was at the request, invitation, demand or suggestion of Seagram."

The only logical inference—and the one which the verdict of the jury found—is that at the conferences admitted and sworn to by respondents, it was agreed between Seagram and Calvert to fix resale prices at the previous O.P.A. level and to put such agreement into effect by joint coercive force.

If evidence of this character is as a matter of law not sufficient to prove a conspiracy in restraint of trade, then the former legal standards for proof of a violation of the Sherman Act have been abandoned. In *Eastern States Retail Lumber Dealers Association v. United States*, 234 U. S. 600, 607, this Court said:

"It is elementary, however, that conspiracies are seldom capable of proof by direct testimony, and may be inferred from the things actually done."

Certainly this unchallenged evidence established an overall pattern of the combination or conspiracy which the jury found to exist. From the things actually done by the respondents four elements of proof, namely identical course of action, opportunity, motive and admission are clearly present. Thus, the evidence, said by the Court of Appeals not to furnish a "scintilla of proof" of concerted action, shows:

(1) An identical course of conduct on the part of the respondents to force upon petitioner an identical price structure,

(2) Ample proof of opportunity by the respondents to have agreed, including the conferences admittedly

held by the respondents, together with the fact of their corporate affiliation,³

(3) An amply sufficient motive for combined action, since the effectiveness of Seagram's coercive tactics would have been seriously impaired without Calvert's joinder, and Calvert, pursuing an independent course, undoubtedly would have enjoyed a part of Seagram's normal market in Indiana, and

(4) The admissions of Calvert, regretfully made to petitioner, that "we have to go along with Seagram" * * * "the other side of the house" * * * "on their sales policy." (R. 40-41)

This Calvert admission alone, we submit, along with the proof of identical action, was amply sufficient to take the issue of conspiracy to the jury. Indeed the Court of Appeals did not hold otherwise. Rather, the court committed a palpable error in holding that Calvert's explanation was not proof against Seagram, because inadmissible under the hearsay rule. The court also held that the inference of conspiracy which could be drawn from Calvert's conduct was likewise not binding on Seagram. No objection was made by Seagram to the introduction of this evidence, no request was made for any limiting instruction by the trial court and no contention was made by respondent involving the competency of this proof in the Court of Appeals. Presumably no such objection was made because Calvert's statements and conduct were unquestionably admissible under the co-conspirators' rule.⁴

³ The Seagram companies occupy space on the south side of the Chrysler Building in New York City; Calvert has space on the north side of the same floors. (R. 41)

⁴ *Winchester & Partridge Mfg. Co. v. Creary*, 116 U. S. 161, *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229; *National Ben Franklin Fire Ins. Co. v. Stuckey*, 79 F. 2d 631 (5th Cir., 1935);

In any event, Calvert's admissions, even if hearsay, having been received without objection from any of the respondents, must be considered as competent evidence. *Diaz v. United States*, 223 U. S. 442, 450; *Schlemmer v. Buffalo, R. & P. R. Co.*, 205 U. S. 1, 9; *Spiller v. Atchison, T. & Santa Fe R. Co.*, 253 U. S. 117. In the last named case, this Court said with respect to hearsay evidence, at p. 130:

"Even in a court of law, if evidence of this kind is admitted without objection, it is to be considered, and accorded its natural probative effect, as if it were in law admissible."

The four elements of proof considered by the jury upon the issue of conspiracy, namely, identical course of action, opportunity, motive and admission, far exceeded the type of proof of conspiracy which is normally available. In *Interstate Circuit, Inc. v. United States*, 306 U. S. 208, 221, the Court said:

"As is usual in cases of alleged unlawful agreements to restrain commerce, the government is without the aid of direct testimony that the distributors entered into any agreement with each other to impose the restrictions upon subsequent-run exhibitors. In order to establish agreement it is compelled to rely on inferences drawn from the course of conduct of the alleged conspirators.

"The trial court drew the inference of agreement from the nature of the proposals made on behalf of Interstate and Consolidated; from the manner in which they

United States v. Vehicular Parking, 52 F. Supp. 751 (D. Del., 1943).

In the *Hitchman* case, it was said:

"In order that the declarations and conduct of third parties may be admissible in such a case, it is necessary to show by independent evidence that there was a combination between them and defendants, but it is not necessary to show by independent evidence that the combination was criminal or otherwise unlawful. The element of illegality may be shown by the declarations themselves."

were made; from the substantial unanimity of action taken upon them by the distributors * * *."

Similarly, in *American Tobacco Co., et al. v. United States*, 328 U. S. 781, 809-10, this Court said:

"The essential combination or conspiracy in violation of the Sherman Act may be found in a course of dealings or other circumstances as well as in any exchange of words. *U. S. v. Schrader's Son*, 252 U. S. 85, 40 S. Ct. 251, 64 L. Ed. 471. 'Where the circumstances are such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement, the conclusion that a conspiracy is established is justified.'"

It follows that the court below, by ignoring the historic function of the jury in determining issues of fact and by rejecting the inferences which could be drawn from the conduct of the parties and from the circumstances proved, arrived at the erroneous conclusion that no conspiracy existed among the respondents. It was for the jury to decide whether the defendants conspired and the jury so found on substantial evidence. That was the type of conclusion concerning which this Court in *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U. S. 555, 566, said:

"But this conclusion rested upon inferences from facts within the exclusive province of the jury, and which could not be drawn by the court contrary to the verdict of the jury without usurping the functions of that fact finding body. * * * the finding of the jury upon that question must be allowed to stand, unless all reasonable men, exercising an unprejudiced judgment, would draw an opposite conclusion from the facts."

II

THE COURT ERRED IN HOLDING THAT THE CONSPIRACY TO FIX RESALE PRICES FOUND BY THE JURY DID NOT VIOLATE THE ANTITRUST LAWS BECAUSE IT WAS A COMBINATION ONLY TO FIX MAXIMUM PRICES FOR THE RESALE OF ITS LIQUOR BY WHOLESALERS.

In ruling that the record here disclosed no restraint of trade, the court below committed two errors. The court erred as a matter of law in holding that a conspiracy to fix maximum prices is not a violation of Section 1 of the Sherman Act. The court further erred as a matter of law, in upsetting the jury verdict based on substantial evidence that the defendants fixed the absolute resale price for their products, and in holding that the defendants were merely fixing maximum resale prices.

The declaration of the Seventh Circuit holding lawful a combination to fix maximum resale prices is a novel and unwarranted restriction of the doctrine in *U. S. v. Socony-Vacuum Oil Co.*, 310 U. S. 150, which holds that all price-fixing agreements are unlawful *per se*.

To permit manufacturers or other sellers in interstate commerce, by agreement and by combination, to fix and coerce maximum price levels would open the door anew, as respects price agreements, to controversy over the question whether the tampering by competitors with price structures is reasonable or unreasonable, a question which has been deemed irrelevant since *United States v. Trenton Potteries Co.*, 273 U. S. 392.

In *U. S. v. Socony-Vacuum Oil Co.*, 310 U. S. 150, it was pointed out (p. 218) that for over forty (now fifty) years "this Court has consistently and without deviation adhered to the principle that price agreements are unlawful *per se*," (not necessarily because of their immediate adverse effect but because of their "actual or potential threat to the cen-

tral nervous system of the economy," note, p. 224).⁵ The Court said, in reversing the Seventh Circuit:

"An agreement to pay or charge rigid, uniform prices would be an illegal agreement under the Sherman Act. But so would agreements to raise or lower prices whatever machinery for price-fixing was used . . . a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*." (at 222-23)

This blanket proscription of price-fixing agreements is grounded particularly on a recognition of the fact that those "who fixed reasonable prices today would perpetuate unreasonable prices tomorrow, since these prices would not be subject to continuous administrative supervision and readjustment in light of changed conditions." (p. 221) It is but a corollary that maximum prices fixed today may

⁵ See:

United States v. Trans-Missouri Freight Assn., 166 U. S. 290.

U. S. v. Joint-Traffic Association, 171 U. S. 505.

Addyston Pipe and Steel Co. v. United States, 175 U. S. 211.

Bobbs-Merrill Company v. Straus et al., 210 U. S. 339.

Standard Sanitary Manufacturing Co. v. United States, 226 U. S. 20.

Eastern States Retail Lumber Dealers' Assn. v. United States, 234 U. S. 600.

United States v. A. Schrader's Son, Inc., 252 U. S. 85.

Frey and Son, Inc. v. Cudahy Packing Company, 256 U. S. 208.

Maple Flooring Manufacturers' Assn. v. United States, 268 U. S. 563.

U. S. v. Univis Lens Co. Inc. et al., 316 U. S. 241.

U. S. v. Bausch and Lomb Optical Co. et al., 321 U. S. 707.

U. S. v. Paramount Pictures, Inc. et al., 334 U. S. 131.

⁶ The Seventh Circuit Court of Appeals in its opinion in the *Socony-Vacuum* case (105 F. 2d 809, 831) stated that there had been too much importance attached to the terms "*price fixing*" and "*price affecting*"; that the true test in determining whether an agreement was unlawful *per se* was its effect upon competition—if competition was suppressed or destroyed (or power to destroy exists), the agreement was illegal *per se*. if not, then the reasonableness of the restraint, whether or not "*undue*", should be determined (p. 831).

become minimum prices tomorrow; and in the case at bar they did become so when the respondents shortly after the successful coercion of downward revision of resale prices to the abandoned O.P.A. level, prescribed the identical resale prices as the *minimum* resale prices for their goods. (R. 104-105)

For still another reason, the crippling constriction by the Court of Appeals of the principles announced by this Court in *U. S. v. Socony-Vacuum Oil Co.*, 310 U. S. 150, constitutes a damaging limitation of Section 1 of the Sherman Act. Such constriction is applied by the Court of Appeals to the fixing of resale prices rather than to the fixing of prices to be obtained by the conspirators themselves. Resale price agreements between sellers involve not only agreement upon prices but, of necessity, agreement upon the means to persuade or, as here, to force adoption of the agreed price by the separate customers of each.

Therefore, wholly apart from the question whether the language of this Court in *U. S. v. Socony-Vacuum Oil Co.*, 310 U. S. 150, admits of valid agreements under the Sherman Act between sellers fixing ceilings for their *own* prices, the Court of Appeals departed from the rationale of the resale price cases in holding that competing sellers legally may combine to refuse to sell their goods to a customer of either or both because he will not submit to their combined dictation of what *his* resale prices should be (whether maximum or minimum). Such a price-fixing combination, as here, of necessity restrains the "freedom of trade on the part of dealers who own what they sell" (*Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 373, 407-8). This agreement on price and means of coercion was clearly "designed to take away dealers' control of their own affairs" (*United States v. A. Schrader's Son, Inc.*, 252 U. S. 85, 100), and was but the prelude to absolute control of price by illegal use of Fair Trade contracts. The resale price cases expressly ban such restraints which are but concrete illustrations of the natural consequences which caused this

Court in *U. S. v. Socony-Vacuum Oil Co.*, 310 U. S. 150, to proscribe as illegal *per se* any tampering with price structures.

The validity of these principles is quite apparent upon an examination of this record. Pious declarations of a determination to "hold the price line" on the part of large producers who are dominant in the market must be examined carefully. Such declarations inevitably occur in a period of rising costs. The compulsion on the part of such producers is to devise methods to protect themselves against increased costs by means other than by raising prices. This is frequently done by cheapening the quality of the product or by "upgrading".

Both of these devices appear in this case. First, although Seagram claimed to be "holding the price line", it cheapened the quality of its product—thus receiving a price pegged by Seagram and Calvert together for less valuable liquor. This was done by adding a greater proportion of younger whiskies to the blend (R. 211-12). The second method used by Seagram to protect its profits under ceiling prices was to concentrate on more expensive brands (e.g., 7-Crown) while withdrawing from sale the cheaper ones (i.e., Kessler and 5-Crown, R. 33, 291).

The wholesaler, on the other hand, cannot similarly protect himself against rising costs in the case of fixed resale prices. He cannot decide what product the dominant producers will make and sell. He must take what he is given. The product he sells is not of his own manufacture. The only way in which he can operate his business at a fair profit is to decide for himself, freely and independently, what prices he is to charge and in that he is controlled both by the goodwill of his customers and the competitive influences of the local market. When dominant producers whose products the wholesaler handles combine to determine the wholesaler's price policy—whether maximum, absolute, or minimum—he no longer enjoys the "freedom of trade on the part of dealers who own what they sell."

(*Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 407-8). We submit that the protection of this freedom is within the aegis of the doctrine that price fixing is illegal *per se*.

The basis for the Seventh Circuit's belief that a conspiracy to fix maximum prices is not a violation of the anti-trust laws is found in the following naive economic dictum:

"Bonafide competition results in benefit to the consumer in the form of lower prices. Higher prices are a detriment to the consumer and are no aid to the competitive system . . . Trade, like competition, is impaired by high prices and the ability to increase prices." (R. 410)

That is to say that the opportunity of distributors to make profits is unimportant in the competitive system; that the survival of independent businessmen and merchants who depend upon large centralized suppliers is not essential in maintaining a healthy merchandizing structure, and that a system of absentee control of businesses in smaller communities by a centralized combination with power to regulate how much money such businesses can make is beneficial to our economy.⁷ If the court's economic dictum

⁷ General Schwengel, the President of Seagram (Indiana) advocated this theory of absentee paternalism in his testimony (R. 256):

"The Court: I say, the thing I can't quite understand is why it was any of your business what they charged for liquor after you got your price out of it.

"The Witness: Well, in today's merchandising it is the manufacturer's business. He has a very serious obligation to the public. For example, under fair trade laws today the manufacturer feels that prices will gradually be more favorable to the public. Other economists may say the fair trade laws increase the price to the public. More and more the manufacturer has an obligation to the public at which his commodity is sold and every manufacturer seeks to deliver that commodity at the most favorable price to his public, taking into consideration a fair and liveable profit to the wholesaler and a fair and liveable profit to the retailer and the markups are just based on the discussion, not maybe for the record, the markups in the distilling business are very fair because we

were true we should enact a perpetual O.P.A., because certainly private agencies cannot be delegated the power to control competition. As Chief Justice Hughes said in the *Schechter* case:

"The government urges that the codes will consist of rules of competition deemed fair for each industry by representative members of that industry—by the persons most vitally concerned and most familiar with its problems.' Instances are cited in which Congress has availed itself of such assistance; as, e.g., in the exercise of its authority over the public domain, with respect to the recognition of local customs or rules of miners as to mining claims, or, in matters of a more or less technical nature, as in designating the standard height of drawbars. But would it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries? Could trade or industrial associations or groups be constituted legislative bodies for that purpose because such associations or groups are familiar with the problems of their enterprises? And could an effort of that sort be made valid by such a preface of generalities as to permissible aims as we find in section 1 of title 1? The answer is obvious. Such a delegation of legislative power is unknown to our law, and is utterly inconsistent with the constitutional prerogatives and duties of Congress." (*Schechter Poultry Corp. v. U. S.*, 295 U. S. 495, 537)*.

feel that the more money a wholesaler makes, a retailer makes, and a tavern keeper makes, the more he will observe the moral code, the more he will pay attention and run his business properly. The minute he loses money he goes off the reservation."

* See the dissenting opinion of Mr. Justice Douglas in *U. S. v. Columbia Steel Co.*, 334 U. S. 495, 536, where, in a different context it was said:

"For all power tends to develop into a government in itself. Power that controls the economy should be in the hands of elected representatives of the people, not in the hands of an industrial oligarchy."

The Evidence Establishes a Conspiracy to Fix Absolute or Actual Resale Prices.

The Seventh Circuit Court of Appeals has here held that none of the interdictions contained in the opinion of this Court in the *Socony-Vacuum* case were applicable because:

"The defendants, as the O.P.A. had previously done, announced a maximum price policy above which their products could not be resold. This was the sole restriction which they sought to place upon the wholesalers who were all accorded the same treatment. No discrimination in this respect was directed at the plaintiff or any other wholesaler. The defendants fixed no price at which their products could or must be resold. The wholesaler was free to fix any price which it saw fit within the maximum limitation. There was no impairment upon their ability to meet a competitor's price or to sell for less. Neither were they required to sell Seagram and Calvert products at the same price. (R. 410)

* * *

"* * * if any agreement was shown it was one to prevent an increase in the resale price." (R. 411)

This erroneous hypothesis to which the Court of Appeals held the legal principles announced by this Court in the *Socony-Vacuum* case did not apply, disregards substantial evidence upon which the jury found, under appropriate instructions of the Court, the existence of a conspiracy to fix absolute resale prices.⁹

There is substantial evidence in the record to support this finding in the following:

Seagram's Vice-President Fischel in his original wire announcing the Seagram policy stated that they had decided to "maintain former O. P. A. prices on all brands" (not as the maximum, but as *the* price), and he asked immediate assurances that this be done (R. 393). Reznik of Calvert

⁹ The trial court specifically refrained from mentioning maximum prices in his instructions (R. 271)

said that they urged wholesalers to keep *the same price* (R. 244). Schwengel of Seagram insisted on sales at *no other price than the O. P. A. price* (R. 68). At the meeting in Chicago, February 3, 1947, Fischel of Seagram wanted to talk only with those Indiana wholesalers who had filed new prices with the Indiana Alcoholic Beverage Commission (R. 84). Wachtel stated that he refused to ship products until the Indiana wholesalers came back to "the price (he) wanted them to charge" (R. 232).

The record also shows with respect to the asserted freedom of the wholesalers to compete that:

1. In November, 1946, both Seagram and Calvert were allocating their products to their customers.

2. Beginning in 1947 there was a general decline in the liquor business, amounting over the next 2¼ years to approximately one-third. (R. 140)

3. Calvert (Sales) eliminated its war-time allocation system in March, 1947. Seagram (Sales) increased its allocations in April, 1947, and in July or August, 1947, eliminated the allocation system.

4. Both Calvert and Seagram filed fair trade contracts in July, 1947, establishing identical price structures on their comparable principal brands.

It is but a reasonable conclusion from such evidence that any freedom of the wholesalers to compete on any price under the ceiling was illusory. Since supplies of liquor were scarce in 1946, obviously no compulsion by respondents was necessary to protect their identical price structures as minimums. Fixing the ceiling was tantamount to fixing the floor. But as soon as supplies became more plentiful, respondents executed and filed fair trade contracts perpetuating their former maximum prices as minima. Moreover, it is obvious that the joint coercive force applied by the respondents by their embargo on ship-

ments to Indiana from November, 1946 to February of 1947 would effectively discourage any deviation from their established price structures, even without the later legal compulsion of the fair trade contracts.

The case went to the jury on the issue of whether the respondents conspired to fix the resale prices of their products and the jury verdict in favor of the petitioner constitutes a finding that the respondents so conspired. The Court of Appeals, ignoring the substantial evidence summarized above, confined its search for the substance of the conspiracy or agreement to the telegram (announcing Seagram's decision to "maintain former O. P. A. prices," R. 393) sent by Seagram to all of its distributors throughout the United States and said:

"Thus this announced policy, together with the refusal on the part of defendants to supply liquor to wholesalers who refused to recognize such policy, embraces every element of the conspiracy, agreement or concerted activity claimed to have been proven." (R. 409)

The opinion of the Court of Appeals does not even suggest that a conspiracy between the respondents to fix an absolute resale price, if found, would be legal under the *Socony-Vacuum* case. The verdict of the jury, under the instructions of the Court, found such a conspiracy and the verdict was amply supported by the evidence.

III

THE OTHER ASSIGNMENTS OF ERROR ON WHICH THE COURT RULED BY DICTA, OR DID NOT DISCUSS, FURNISH NO GROUND FOR REVERSING THE JUDGMENT OF THE DISTRICT COURT AND THE VERDICT AND JUDGMENT SHOULD THEREFORE BE REINSTATED.

In the statement of the questions involved, we have asked the Court to consider the questions ruled upon by dicta or not discussed by the Court of Appeals, and which there-

fore could not be referred to in the petition for certiorari. In *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U. S. 555, an antitrust action, the Court, *sua sponte*, examined the assignments of error not decided by the Circuit Court and affirmed the judgment of the District Court. We respectfully ask the Court for the reasons above assigned (*supra*, p. 2) to reverse the judgment of the Circuit Court and to affirm the judgment of the District Court. Since the remaining assignments of error present only law questions, one of which is an important question in the judicial administration of the antitrust laws, and since respondents will have full opportunity to present their contentions, there is ample basis for serving the desirable end of concluding this litigation. We ask, therefore, for final judgment on these additional assignments.

The *Story Parchment* case goes much further than we ask the Court to go here. That case was also a treble damage action brought under the antitrust laws where the jury brought in a verdict for plaintiff. On appeal to the circuit court, 37 F. (2d) 537 (1st Cir. 1930), the judgment was vacated with directions to enter judgment for the defendants on the sole ground that the plaintiff had not sustained the burden of proving recoverable damages.

Eight other assignments of error were urged before the circuit court but were not discussed. These questions were neither argued nor briefed before the Supreme Court. The Court, however, considered all of them and thereafter reinstated the jury verdict.¹⁰

¹⁰ There have been other cases involving the antitrust laws in which the Supreme Court has directly affirmed the District Court's judgment in favor of plaintiff after a reversal by the Circuit Court.

See: •

Bigelow v. RKO Radio Pictures, 327 U. S. 251 (in which the Circuit Court reversed on the sole ground that damages had not been adequately proven);

Thomsen v. Caysen, 243 U. S. 66 (in which the Circuit Court reversed on the sole ground that the restraint was not "unreasonable").

(i) *The assignment that the court erred in instructing that it was no defense to this action even though plaintiff and other wholesalers entered into a separate and independent conspiracy among themselves to fix prices.*

Though this assignment of error¹¹ was not made a distinct ground for reversal by the court below, nevertheless the opinion clearly says by way of dicta that as a matter of law a separate conspiracy between the plaintiff and other wholesalers would be a defense to the conspiracy charged in the complaint. The court said:

"In fact, defendants pleaded this situation as a defense and it was assigned by them as a reason, particularly by Seagram, for their refusal to supply the wholesalers with liquor. That they had a concrete reason for being concerned is shown by the fact that some of the instant defendants had been convicted and penalized in a criminal prosecution under circumstances much akin to those of the instant situation. See *United States v. Frankfort Distillers, Inc.*, 324 U. S. 293. If they had sold to the wholesalers with knowledge that the latter were engaged in a price fixing conspiracy of their own, defendants might have found themselves impaled on one prong of a two-horned dilemma." (R. 407-8; 182 F. 2d 233.)

The principle expressed in the above quotation would, if the case were remanded, require the Court of Appeals to grant a new trial on the issue of the alleged wholesalers' conspiracy.

¹¹ Defendants' Point 4 relied on in the appeal below reads as follows:

"The Court erred in so much of his instructions to the jury as stated: 'that it is no defense to this action even though the plaintiff and the other wholesalers entered into a conspiracy among themselves,' and that that would be no defense if the defendants were guilty of the conspiracy charged in the complaint, to which portion of the Court's instructions exception was taken." (R. 362)

The instruction reads as follows:

"I might say at this time that it is no defense to this action, even though the plaintiff and the other wholesalers entered into a conspiracy among themselves, that would be no defense to this action, if the defendants entered into the conspiracy charged in the complaint." (R. 264.)

In effect, the instruction tells the jury:

1. That the motivation of defendants who have combined to fix prices is immaterial. Here the claim was that the respondents, believing that petitioner had conspired with other wholesalers, had the right and the duty to combine and conspire to police the industry and to refuse to sell to those who were not obeying the antitrust laws.

2. That a treble damage action is not barred by the equitable doctrine of "clean hands," if the plaintiff is shown to be engaged in an independent conspiracy with others, not parties to the action, to violate the antitrust laws in connection with the product which he is purchasing from the defendants.

The statement in the opinion of the court below on this point raises an important question of law which should be settled here to avoid a new trial. It makes the alleged separate conspiracy of the petitioner a defense to the conspiracy charged in the complaint.

The court has indicated, as a matter of law, that if the defendants entertained the belief that they might become involved in an antitrust violation if they sold to petitioner,¹² they could for that reason combine and conspire to boycott the petitioner. The court here confuses the action

¹² The respondents claimed fear of a repetition of an indictment like that considered by this court in *U. S. v. Frankfort Distillers, Inc.*, 324 U. S. 293, was obviously a sham defense since that decision required active participation by the respondents.

which an individual could take with his right to combine with others. Certainly if any of the respondents thought it dangerous to become involved with petitioner, it could separately decline to deal with petitioner. The law is that any individual may select his own customers. *United States v. Colgate & Co.*, 250 U. S. 300, 307. This rule gives all the protection that any seller, acting singly, needs to avoid being involved with undesirable people. But this doctrine certainly affords no possible justification for the respondents having combined with each other to withhold shipments, thereby accomplishing a restraint of trade.

Even if it were true that the reason the respondents combined to refuse shipments to petitioner was that they had learned petitioner was conspiring with other wholesalers to violate the antitrust laws, this would constitute no justification for the respondents having restrained trade and in the process injuring petitioner.

The basis of the defense raised by this assignment could only be that respondents, with impunity, may combine in restraint of trade in order to see to it that the antitrust laws are obeyed in the distribution of liquor by wholesalers. Such police power cannot be exercised by a combination of private individuals. To permit them to do so would be to delegate the authority of the government to private parties and to deprive even suspected persons of the protection of the antitrust laws. Nor would it make any difference if the suspected persons could actually be proven guilty of violation of the antitrust laws in some independent conspiracy. For example, we may take a case recently decided by this Court. The Schine motion picture circuit has been held to have violated the antitrust laws (*Schine Chain Theatres v. United States*, 334 U. S. 110). Suppose during the course of the trial a combination of motion picture producers in restraint of trade had deprived the Schine Circuit of screen plays, driven it out of business, and caused it irreparable damage. Certainly such a combination could not successfully defend a suit for treble damages because of a finding

of violation of the Sherman Act in the government's suit.

The instruction takes away no rights from the defendants if, as a matter of fact, they have been damaged by some alleged conspiracy between plaintiff and other wholesalers. If such damage could be shown, a suit could be brought against the parties to that conspiracy.

The defense which this assignment of error brings forward is similar to defenses which have been urged over and over again before this Court and each time have been rejected. In the *Socony-Vacuum* case, 310 U. S. 150, it was argued that a combination to put a floor under prices was justified since it preserved competition in the industry by protecting the small concerns which otherwise would not survive. In the *Univis Lens* case, 316 U. S. 241, the restraint of trade charged was alleged by the defendants to be justified since it protected the consumer of spectacles from inferior goods which would presumably be sold by price cutters. In the *Ethyl Gasoline* case, 307 U. S. 436, it was argued that the restraint of trade and the withholding of oil products from certain jobbers was justified in order to protect the public against the careless use of poisonous ethyl gas. In the *Fashion Guild* case, 312 U. S. 457, the restraint of trade was claimed to be justified because the defendants had a right to defend against style piracy.¹³

In each of these cases, the asserted justification, based on claimed beneficent purposes, was held to present no valid defense and to be wholly immaterial. The test applied has been rather whether the conspiring defendants in fact effected a restraint of trade.

The power to penalize for engaging in a conspiracy to restrain trade cannot be delegated to a private combination. This is the function of the Department of Justice

¹³ *U. S. v. Socony-Vacuum Oil Company*, 310 U. S. 150;

U. S. v. Univis Lens, 316 U. S. 241;

Ethyl Gasoline Corp. v. U. S., 309 U. S. 436;

Fashion Originators' Guild of America v. F. T. C., 312 U. S. 457.

and the courts. To hold otherwise would be to invite the destruction of the business of any person who is accused of having violated the antitrust laws.

The clean hands doctrine. In the court below respondents relied, in support of this assignment of error, upon the case of *Maltz v. Sax*, 134 F. 2d 2 (7th Cir., 1943), to argue that petitioner did not come into court with clean hands and therefore could not recover. That case involved a conspiracy to interfere with plaintiff's manufacture of punchboards. The court did not hold plaintiff's business illegal but noted that the distribution of punchboards was at least against public policy. For that reason, the court said:

"Plaintiff has no legal right in a business the conduct of which was gambling for which he may obtain protection either in an action at law or a suit in equity."

It followed that, of course, such a plaintiff could not invoke the protection of the antitrust laws nor, under the theory of the court, could the plaintiff invoke any legal protection.

The case, even if sound on the facts [which is doubtful], cannot conceivably apply to the case at bar unless it be held that the sale of liquor is against public policy and therefore quasi-illegal. This Court has repeatedly held that a violation of the antitrust laws does not put a plaintiff beyond the pale of legal protection.¹⁴

¹⁴ *Bruce's Juices v. American Can Co.*, 330 U. S. 743, *A. B. Small Co. v. Lamborn & Co.*, 267 U. S. 248, *Wilder Mfg. Co. v. Corn Products Refining Co.*, 236 U. S. 173, *Connelly v. Union Sewer Pipe Co.*, 184 U. S. 546.

A violation of the antitrust laws has been held to be a valid defense only (i) in cases where the plaintiff and the defendant are *in pari delicto*, *Continental Wall Paper Co. v. Voight & Sons*, 212 U. S. 227. Cf. *Connecticut Importing Co. v. Frankfort Distilleries*, 101 F. 2d 79 (2 Cir., 1939) which doctrine respondents properly conceded below to be inapplicable, (ii) in cases where the judgment of the court will promote a violation of the antitrust laws by the plaintiff, *Morton Salt Co. v. G. S. Suppiger Co.*, 314 U. S. 488,

Respondents' argument has been in effect rejected by this Court in *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U. S. 219. That was a treble damage action brought by a sugar beet grower in California against a sugar refiner. Plaintiff charged that the defendant together with other refiners had conspired to fix a uniform price for sugar beet purchases. It was pleaded in defense that by contracts signed with defendant and other refiners, the plaintiff had violated the antitrust laws and therefore had no standing to sue. The District Court upheld this defense, 64 F. Supp. 265, 267 (S. D. Cal., 1946), citing *Maltz v. Sax*, *supra*, in that connection, but the Circuit Court did not pass on the question, 159 F. 2d 71, 72 (9th Cir., 1947). The Supreme Court reversed, saying at 334 U. S. 219, 242-3:

"It does not matter, contrary to respondents' view that growers contracting with the other two refiners may have been benefited rather than harmed, by the combination's effects, even if that result is assumed to have followed. It is enough that these petitioners have suffered the injuries for which the statutory remedy is afforded. For the test of the legality and immunity of such a combination, in view of the statute's policy, is not that some others than the members of the combination have profited by its operation. It is rather whether the statute's policy has been violated in a manner to produce the general consequence it forbids for the public and the special consequences for particular individuals essential to the recovery of treble damages. . . ."

A doctrine which would put a businessman beyond the pale of legal protection because in the course of a legitimate business he is alleged to have engaged in an antitrust violation is supported neither by authority nor by common

(iii) in cases where the plaintiff is held not entitled to assert an estoppel against contesting the validity of his patent, where the license fixes prices. *Sola Electric Co. v. Jefferson Electric Co.*, 317 U. S. 173.

sense. Certainly suppliers cannot with impunity conspire to put an end to his business.

(ii) *The Additional Assignments of Error Before the Court of Appeals Are Groundless.*

Before the Court of Appeals, the respondents assigned error on the failure of the trial court to give their requested instructions numbered 3 (R. 354) and 10 (R. 357). Such tendered instructions were intended to withdraw from the jury any issue of violation of Section 7 of the Clayton Act and to instruct the jury in terms of the so-called "single trader doctrine" embodied in *United States v. Colgate and Co.*, 250 U. S. 300. The instructions given by the Court required the jury to find a contract, combination or conspiracy to fix resale prices in violation of Section 1 of the Sherman Act. (R. 265-7.) Under such an instruction the jury clearly would not have been entitled to find for the petitioner on the basis of a violation of Section 7 of the Clayton Act, nor would the jury have been entitled to find for the petitioner if the respondents were individually exercising their rights as "single traders."

Respondents also asserted error based upon the admission of certain evidence. The District Court permitted the reading, over objection, of certain answers to interrogatories relating to the productive capacity and volume of sales of the respondents [R. 377-8 (Nos. 8, 9 and 10); R. 384 (No. 10); R. 388 (Nos. 31, 32); R. 390-91 (No. 7)]. This evidence was material to show the coercive power of the restraint imposed and, by demonstrating an increase in respondents' sales after 1946 despite a general decline in liquor business, was material to the issue of petitioner's damage.

The respondents also asserted error in the admission of testimony of a representative of Ernst & Ernst, certified public accountants and petitioner's auditors for twenty years, with respect to petitioner's volume of sales from 1946 through 1949 and with respect to the additional costs

and expenses, based on petitioner's experience, which petitioner would have incurred if its sales volume had not declined after 1946. (R. 126) The qualifications of the witness were freely conceded (R. 118), a showing was made of the voluminous character of petitioner's books (R. 124-125, 133-134) and the accuracy of the books was proved by the testimony of petitioner's auditor (R. 125.) Such testimony was admissible under Indiana decisions and was, therefore, properly admitted by the District Court. *Hollingsworth v. State*, 111 Ind. 289, 12 N. E. 490; *Chicago, St. L. and P. R. Co. v. Wolcott*, 141 Ind. 267, 39 N. E. 451; *Cleveland, C. C. & St. L. Ry. Co. v. Woodbury Glass Co.*, 70 Ind. App. 298, 120 N. E. 426, Rule 43(a) of "Rules of Civil Procedure for the United States District Courts." Petitioner twice expressed a willingness to bring the voluminous books to Court (R. 120, 133) and respondents gave only equivocal answers such as "possibly not" (R. 120) to the Court's inquiries whether the respondents insisted on production of the books (R. 120, 123.)

The final assignment related to the admission of opinion testimony of an expert witness, evaluating the relative contributions to petitioner's decline in sales volume of a general decline in business and the loss of the Seagram and Calvert lines. No objection was made by respondents on the basis of the lack of qualification of the witness to express an opinion (R. 139.) Where, as here, the fact of damage has been established, the evaluation given was clearly competent. See, *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U. S. 390, 405, 408-409, cited in *Bigelow v. RKO Pictures*, 327 U. S. 251. See also, *William H. Rankin v. Associated Bill Posters of U. S.*, 42 F. (2d) 152, 156 (2d Cir. 1930)

We think that this description of the additional assignments of error shows not only that they are groundless but also that, even if there were some possible merit to them, they are so trivial as not to constitute reversible error in view of the exhaustive evidence shown in the record.

CONCLUSION.

For the above reasons, we respectfully urge the Court to remand this cause to the District Court with instructions reinstating the jury verdict and the judgment there entered.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM 1950.

No. 297.

KIEFER-STEWART COMPANY, *Petitioner,*

v.

JOSEPH E. SEAGRAM & SONS, INC., SEAGRAM-DISTILLERS CORPORATION, THE CALVERT DISTILLING COMPANY AND CALVERT DISTILLERS CORPORATION, *Respondents.*

**On Writ of Certiorari to the United States Court of Appeals
for the Seventh Circuit.**

REPLY BRIEF FOR PETITIONER.

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IN THE
Supreme Court of the United States

OCTOBER TERM 1950.

No. 297.

KIEFER-STEWART COMPANY, *Petitioner*,

v.

JOSEPH E. SEAGRAM & SONS, INC., SEAGRAM-DISTILLERS CORPORATION, THE CALVERT DISTILLING COMPANY AND CALVERT DISTILLERS CORPORATION, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals
for the Seventh Circuit.

REPLY BRIEF FOR PETITIONER.

I. THERE WAS SUBSTANTIAL EVIDENCE TO SUSTAIN THE JURY FINDING OF CONSPIRACY AMONG THE RESPONDENTS.

a. Respondents have advanced erroneous standards for testing the jury verdict.

Respondents' attempt to demonstrate (Respondents' Brief, pp. 14-20) that there is no evidence to support the jury's finding of a conspiracy between respondents to fix and coerce resale prices, shows two of the vices inherent in the holding of the Court of Appeals and adds a third fallacy. Both the court below and respondents treat the

evidence as though its sum total amounted only to proof of parallel action, both ignoring the fact that the strong circumstantial evidence of combination was conclusively sealed by the admission of two top Calvert officials that Calvert "*had to go along with Seagram . . . on their sales policy*" (R. 40). Further, both the court below and respondents are guilty of testing the proof of the ultimate question of fact, i. e. conspiracy, by dealing with each of the various elements of proof as a separate isolated fact and ignoring the overall probative weight of the evidence considered in its entirety. (See Petitioner's Brief, pp. 19-21, 22-23.) The correct standard has been elsewhere well stated by the court below in *United States v. New York A. & P. Tea Co.*, 173 F. 2d 79, 81 (7 Cir., 1949):

"In this consideration, we look only to the evidence which is favorable to the court's finding and such reasonable inferences as may be drawn from the facts proved. Furthermore, we consider the case here as a whole and not piecemeal. If viewing the evidence as a whole there emerges an overall pattern of guilt as charged, the finding must be sustained." (Emphasis supplied.)

Respondents now seek to compound their errors by refusing to recognize that it was the jury's right to disbelieve the testimony of respondents' witnesses and by ignoring what the brief of the Solicitor-General, *amicus curiae*, refers to (p. 12) as "the function of the jury to weigh the credibility of the defendants' testimony against the permissible inferences to be drawn from their conduct." Illustrative is respondents' contention that Calvert, prior to November 6, 1946, had, independently of Seagram, determined upon a sales policy involving control of the resale prices of petitioner and other Indiana wholesalers through the suspension of shipments (Respondents' Brief, p. 14). This contention is contrary even to the conclusion arrived at by the court below, which was that "up to November 19,

1946, Calvert was pursuing its own independent course, which was directly opposite to that which had been announced by Seagram." (R. 405) Respondents' contention to the contrary in effect is based upon these premises: (i) That only the testimony of Wachtel on direct examination and not Calvert's conduct in Indiana nor the statements of its three high officials, Gollin, Reznik and Schwalb, can be considered in determining what Calvert's policy was between November 6 and November 19, 1946; (ii) that Calvert decided to suspend shipments prior to November 6, 1946; and (iii) That no inference that Calvert's action in cancelling its commitments to petitioner was the result of agreement with Seagram, could be drawn from the statements of Reznik and Schwalb that Calvert "*had to go along with Seagram * * * on their sales policy*".

The mere fact that Wachtel may have claimed from the witness stand, in an attempt to legalize Calvert's conduct, that he had decided to cut off his Indiana customers before November 6th, did not require the jury to accept that explanation—which was in the teeth of the proof that Gollin, Schwalb and Reznik had indicated until November 19th that, "*regardless of what Seagrams did*", Calvert was going through with the Kiefer-Stewart deal, and, on November 19th, that Calvert had recanted because it had to go along with Seagram on the latter's sales policy.

Secondly, the claim that Calvert decided to suspend shipments prior to November 6th is contradicted by the testimony of Reznik, who claimed to have participated with Wachtel in making that decision (R. 241). Reznik testified that on November 19th he told Moxley "*we are going to stop shipping everybody*" (R. 241), that he instructed Schwalb on that day to notify every wholesaler in Indiana, including Kiefer-Stewart, that their distributorships were discontinued (R. 239-243), and that "*this policy was decided a day or two before then because we had made up our minds in New York and I came on to Chicago*" (R. 245). Moreover, Reznik's version of the date of the deci-

sion is the only one consistent with Calvert's action in executing a new list of distributors, including Kiefer-Stewart, on November 13, 1946 and filing the same with the Indiana Alcoholic Beverage Commission on November 16, 1946. (Plaintiff's Exhibit No. 10, R. 78, 297-298).

The attempted explanation of Calvert's negotiations with petitioner after November 6th, based on Schwalb's claim that petitioner had requested deferment of its shipments (R. 223), was denied by Baker (R. 111), and the evidence clearly showed that the Calvert merchandise was promised for delivery at the time of the big meeting planned in Indianapolis for November 23rd (R. 82, 109).

And, finally, Calvert's explanation of the reason for its abrupt about-face was more than a description "of the action being taken" (Respondent's Brief, p. 18); it was both an explanation and a candid apology.

Upon the question of fact thus presented to the jury, the language of this Court in *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 35, is particularly appropriate:

"The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable."

b. Corporate affiliation bestows no immunity.

Apparently cognizant of their inability successfully to assail the finding by the jury of a combination and conspiracy, the respondents in their answer brief have urged a new defense, not presented in the court below, in the form of a claimed immunity from the operation of the Sherman Act.

This defense, obviously urged by way of afterthought, appears to be that, irrespective of the fact that the evidence establishes a combination which, among independent traders, would be a violation of the Sherman Act, the status of respondents "as mere instrumentalities of a single manufacturing-merchandising unit precludes the possibility of any 'conspiracy' condemned by the Sherman Act" (Respondents' Brief, p. 20). This unique, eleventh-hour defense seeks to convince this Court that in spite of a judgment and verdict in the District Court there was a price-fixing conspiracy and even if, as a matter of law, such a conspiracy violates the Sherman Act, nevertheless these respondents (who, in fact, hold themselves out to the public as independent traders) are not answerable merely because they are closely connected by corporate interrelationships.

In *Schenley Distillers Corp. v. U. S.*, 326 U. S. 432, Schenley claimed that a wholly-owned trucking company, whose operations were to be performed solely for its parent, was on that account a private rather than a contract carrier. This Court, rejecting that contention, stated the broad governing principle in the following language (at p. 437):

"While corporate entities may be disregarded where they are made the implement for avoiding a clear legislative purpose, they will not be disregarded where those in control have deliberately adopted the corporate form in order to secure its advantages and where no violence to the legislative purpose is done by treating the corporate entity as a separate legal person. One who has created a corporate arrangement, chosen as a means of carrying out his business purposes, does not have the choice of disregarding the corporate entity in order to avoid the obligations which the statute lays upon it for the protection of the public.

"The fact that several corporations are used in carrying on one business does not relieve them of their

several statutory obligations more than it relieves them of the taxes severally laid upon them."¹

U. S. v. Yellow Cab, 332 U. S. 218, involves an application of this principle to interrelated corporations under common ownership, charged with having violated the anti-trust laws. This Court said with respect to the asserted immunity of companies under common ownership that (p. 227):

"The test of illegality under the Act is the presence or absence of an unreasonable restraint on interstate commerce. Such a restraint may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent."

United States v. Columbia Steel, 334 U. S. 495, on which respondents rely, gives no support to their contention that affiliated companies are accorded favored treatment under the Sherman Act. There the Government argued that the intent and tendency of the purchase of Consolidated Steel by United States Steel was to effect an exclusive dealing arrangement between them. Having failed to prove that the exclusive dealing arrangement inherent in the acquisition unreasonably restrained trade, the Government nevertheless contended that any exclusive dealing arrangement was illegal *per se* if accomplished by integration, relying on *U. S. v. Yellow Cab Co.*, 332 U. S. 218. This Court quite properly pointed out that the *Yellow Cab* case stood for no such principle saying (pp. 521-22):

"We do not construe our holding in the *Yellow Cab* case to make illegal the acquisition by United States Steel of this outlet for its rolled steel without consideration of its effect on the opportunities of other com-

¹ See also decisions of this Court under the "Commodity Clause". *United States v. Delaware & Hudson Co.*, 213 U. S. 366; *United States v. Lehigh Valley R. Co.*, 220 U. S. 257; *United States v. Delaware, Lackawanna & Western R.*, 238 U. S. 516; *United States v. Reading Co.*, 253 U. S. 26; *United States v. Lehigh Valley R. Co.*, 254 U. S. 255; *United States v. Elgin, Joliet & Eastern R. Co.*, 298 U. S. 492.

petitor producers to market their rolled steel. In discussing the charge in the *Yellow Cab* case, we said that the fact that the conspirators were integrated did not insulate them from the act, not that corporate integration violated the act."

These respondents are in no position to claim an immunity not available to them if "viewed as independent traders", when they have deliberately asserted their independence both here and before the public. At the trial, James E. Friel, vice president and treasurer of all respondents, testified with respect to all four respondents as follows: (R. 152)

"Q. Each one is a separate corporation? A. That is correct.

Q. Had its own officers? A. Yes, sir.

Q. Kept its own books? A. Yes, sir.

Q. Dealt with the public separately? A. Yes, sir.

Q. Made separate contracts with the public? A. Yes, sir.

Q. Did the Seagram Distillers ever hold itself out to the public as having any connection with the Calvert Sales Company? A. No, sir.

Q. And the same is true, Calvert never held itself out as having any connection with Seagram? A. That is correct.

The Court: They were really competitors?

The Witness: Really competitors."

Other evidence in the record shows that respondents were meticulous in maintaining their separate entities and all appearances of competition before the public (R. 382, 392).

The argument of the respondents, to the extent that it is applicable to this case, reduces itself to this: That separate corporations may through separate dealings with the public, as independent traders, reap all of the advantages of that arrangement and still, with impunity under the Sherman Act, conspire to fix resale prices and to coerce and boycott wholesalers, because their independence was only a sham or device to exploit the sale of their products to the public.

II. THE CONSPIRACY ALLEGED AND FOUND IS ILLEGAL.

Respondents contend that the legality of their combination and conspiracy with respect to resale prices should be considered without regard to the evidence adduced (Petitioner's Brief, pp. 32-34) to show that respondents fixed absolute resale prices. This contention is based on the alleged absence of any allegation in the complaint to that effect. The complaint charged that (R. 14, par. 28):

"Seagram * * * subsequent to November 12, 1946 * * * induced defendants Calvert and Calvert (Sales) to enter into an agreement, contract, combination and conspiracy unlawfully to agree upon and fix the resale prices of said defendants' respective whiskies sold to wholesalers in Indiana and unlawfully to cut off and cease all shipments of their respective whiskies * * * to such of the Indiana wholesalers as did not agree to abide by the resale prices so fixed and agreed upon by the said defendants."

Respondents contend that a conspiracy to fix maximum resale prices is not illegal under the Sherman Act and, further, that such a conspiracy is actually protected by the terms of that statute.

That contention is based on this Court's decision in *Apex Hosiery Co. v. Leader*, 310 U. S. 469. That case obviously does not limit in any way the doctrine that all price-fixing by business groups is illegal *per se*, as announced in *U. S. v. Socony-Vacuum Oil Co.*, 310 U. S. 150. The Court pointed out in the *Apex* case that the restraint by the employees in that case had no actual or intended effect on price or price competition (p. 504) and that labor strikes had historically been held illegal only when they are intended to have, or in fact have, effects on the market process. The *Socony-Vacuum* principle is directly based on the deleterious effect on the market of price-fixing agreements, and their actual or potential threat to the central nervous system of the economy makes them illegal *per se*.

III. THE COURT SHOULD DISPOSE OF THE OTHER ASSIGNMENTS OF ERROR AND REINSTATE THE JUDGMENT OF THE DISTRICT COURT.

Petitioner's principal brief fully presented and argued the other assignments of error not formally decided by the Court of Appeals. Respondents also have fully briefed their position on such assignments and have urged this Court to consider them if this Court reverses the Court of Appeals. This Court has disposed of questions not decided by an appellate court and reinstated the judgment of a District Court in an antitrust action, *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U. S. 555.

The principal assignment of error argued in the court below was in effect decided against petitioner by a dictum in the opinion. (R. 407) Respondents contended that they could try before the jury as a defense the question whether petitioner and other wholesalers, not parties here, had conspired among themselves to fix prices. The trial court instructed that such a separate and independent conspiracy could not be a defense or an issue in this case. (R. 264) The Court of Appeals said in effect that the existence of such a conspiracy among purchasers of whiskey could be a legitimate excuse for the combined action of the respondents shown by the record in this case. (R. 407)

This is a doctrine without support either in logic or authority. If this issue is not decided by this Court, the case will be remanded for new trial by the court below on an er-

roneous theory. It is therefore an important issue now before this Court which should be decided.

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TILLING COMPANY AND CALVERT DISTILLERS
CORPORATION,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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BRIEF FOR RESPONDENTS IN OPPOSITION.

OPINION BELOW.

The opinion of the Court of Appeals reversing the Dis-
trict Court (R. 399) is reported at 182 F. 2d 228.

JURISDICTION.

The jurisdictional requisites are adequately set forth in
the Petition.

QUESTIONS PRESENTED.

1. Whether combination of competing sellers to enforce
maximum resale prices for their products shipped in in-
terstate commerce is a combination in restraint of trade

or commerce within the meaning of the first sentence of Section 1 of the Sherman Act.¹ Act July 2, 1890, C. 647, Sec. 1, 26 Stat. 209, as amended Aug. 17, 1937, C. 690 Tit. VIII, 50 Stat. 693; U. S. C. A. T. 15 Sec. 1.

2. Whether the Court of Appeals erred in holding that evidence of combination or conspiracy was insufficient to support the jury's verdict.²

STATUTE INVOLVED.

The only Federal Statute directly involved at this stage of the controversy is the following portion of Section 1 of the Sherman Act:

“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal:

Act. July 2, 1890, C. 647, Sec. 1, 26 Stat. 209, as amended Aug. 17, 1937, C. 690 Tit. VIII, 50 Stat. 693; U. S. C. A. T. 15, Sec. 1.”

1. The original complaint asserted a combination in restraint of trade (R. 14-16), and also violation of Section 7 of the Clayton Act (Act Oct. 15, 1914, C. 323, 38 Stat. 731, U. S. C. A. T. 15, sec. 18). (R. 9.) The latter assertion was abandoned (R. 401) and the only provision of the “anti-trust laws” now involved is Section 1 of the Sherman Act.

2. The factual assumptions contained in petitioner's statement of the second “question presented” will be discussed hereafter.

STATEMENT OF THE CASE.

Upon the facts in evidence, the Court of Appeals held:

(1) That there was insufficient evidence of combination or conspiracy to support the verdict of the jury. (R. 409.)

(2) That even assuming a combination, the record evidenced no restraint of or attempt to restrain trade in violation of section 1 of the Sherman Act. (R. 409-412.)

Petitioner is a wholesale drug and liquor dealer at Indianapolis, Indiana, and prior to November, 1946, was a distributor of the products manufactured and sold by the Seagram respondents. (R. 16, 20.) Subsequent to October 21, 1946, petitioner made tentative arrangements, never consummated, to become a distributor of the products of the Calvert respondents. (R. 38, 108.)

Respondents, at all times material, have, directly or indirectly, been the wholly owned subsidiaries of Distillers Corporation Seagram, Ltd., a Canadian corporation, which owns all the stock of respondent Joseph E. Seagram & Sons, Inc. Since 1945 the latter corporation, which manufactures distilled spirits, has owned all the stock of Seagram Distillers Corporation and of Calvert Distilling Co. The latter, also a manufacturer, owns all the stock of Calvert Distillers Corporation. Seagram Distillers Corporation and Calvert Distillers Corporation are respectively the sellers and distributors of the products of their immediate parents. (R. 280-281.)

When O. P. A. liquor price control terminated in October 1946, Fischel, sales executive of Seagram, determined not to raise prices and to ask all dealers to conform. (R.

201-202.) Wachtel, Calvert President, made like determination. (R. 230.) These decisions were reached separately, and not discussed between the companies until subsequent to November 6, 1946. (R. 232, 235.) The Seagram policy was announced to all wholesalers by telegram November 6, 1946. (R. 393.) Calvert also made public announcement in the press.³ (R. 230.)

About November 1, 1946, practically all Indiana liquor wholesalers, including petitioner (R. 308), filed simultaneous notifications of identical resale price increases with the Indiana Alcoholic Beverage Commission. (Defts.' Exs. 1-22, inc., R. 299-322, introduced, R. 163, 164, 165.) Upon learning of this action Fischel, for Seagram, ordered shipments to Indiana discontinued. (R. 204-205.) Wachtel, for Calvert, did likewise. (R. 228.) Both took this action to avoid complicity in an illegal conspiracy of Indiana wholesalers. (R. 204, 228.) Both respondent sales companies and Fischel, individually, had been convicted for participation in a similar conspiracy of Colorado wholesalers. (Defts.' Exs. 23, 24, R. 324, 341, 342, 346; introduced, R. 213.) Seagram advised all Indiana distributors that no more shipments would be made until they "went along with our program", to "hold the line" on prices. (R. 196.) Calvert shipments to Indiana ceased at "the end of the first week or the beginning of the second week" in November, 1946. (R. 221.) "Conferences" between Seagram and Calvert officials concerning this action were held after, but not before the decisions were made. (R. 379, 383, 391, 392, 232, 235, 246.)

Schwalb, Calvert's Central Division Manager, in person, and Gollin, Assistant Sales Manager, by telephone, continued negotiation as to petitioner's new Calvert distributorship, through November 12, 1946. (R. 97.) Schwalb

3. The Court of Appeals is in error in asserting that, "No policy was ever announced by Calvert other than that it would follow the Seagram policy." (R. 409.)

made detailed arrangement for petitioner to become a Calvert distributor after cessation of Calvert Indiana shipments because he "did not know when we would start shipments, a week, two weeks, three weeks, three months."

(R. 221.) Petitioner had never received any Calvert merchandise, and itself had requested deferred shipment of an order already placed. (R. 223, 224.) November 19, 1946, Schwalb notified Moxley, petitioner's President, that the order would be cancelled. (R. 217-218.) Moxley testified that this notice was accompanied by the statement that "we have to go along with Seagram" (R. 40), and that Calvert's general sales manager, Reznik, gave as a reason that they "had to go along with the other side of the house." (R. 41.) Schwalb and Reznik corroborated the refusal but denied the reason given. (R. 218, 240.) Wachtel had determined the Calvert "hold the line policy", not Gollin, Reznik or Schwalb. (R. 228.)

The record does not support the assertion (Petition, p. 6) that "petitioner later capitulated and put into effect the prices demanded by Seagram." Lutz told Grube that "so far as I knew we were filing new prices." (R. 84.) But Lutz failed wholly to assert that any new prices on Seagram merchandise were ever filed by petitioner. (R. 103.)

The "fair trade" contracts of 1947 (R. 287-289) were supplied by the Indiana Alcoholic Beverage Commission pursuant to its fair trade regulation No. 11, and were required to be made to legalize Indiana newspaper advertising of brands and price. (R. 214-215.) What "pretense" (Petition, p. 8) was thereby abandoned is not clear. The "fair trade" prices were the old O. P. A. prices. (R. 104-105.)

It is not true (if relevant) that Seagram cheapened its product. This is the assertion of petitioner's counsel, which the witness refuted. The younger whiskies used are not necessarily less costly. (R. 211-212.)

SUMMARY OF ARGUMENT.

The decision of the Court of Appeals as to the sufficiency of the evidence of conspiracy is not of sufficient general importance to warrant granting the writ. However, that decision is clearly right.

There was no direct contradiction of respondents' witnesses as to the separate conception and origin of the identical price policies followed by the two sales companies, and the circumstances relied upon to show combination or conspiracy are, considered either separately, or together, wholly inconclusive and as easily susceptible of contrary inferences. Thus the Court of Appeals properly held the evidence insufficient to support a verdict in favor of the party sustaining the burden of proof.

The Court of Appeals has also correctly held that the evidence disclosed no violation of Section 1 of the Sherman Act, even assuming that respondents acted in combination. The action taken by respondents to procure observance of former O. P. A. maximums in the resale prices of their products had no tendency to suppress or restrain competition, but the contrary. Hence it could not constitute a violation of Section 1 of the Sherman Act which prohibits restraints of trade. This prohibition has many times been held to be directed against action having the effect of restraining competition, and the Court of Appeals was clearly right in holding that action to control resale prices which does not restrain competition does not restrain "trade" within the meaning of the Act.

ARGUMENT.

I.

In Holding That Evidence of Combination or Conspiracy Was Insufficient to Support the Verdict, the Court of Appeals Following Established Techniques of Judicial Review and Was Clearly Right.

Error of the Court of Appeals in its appraisal of the sufficiency of the evidence, if it existed, would scarcely warrant certiorari. *Southern Power Company v. Public Service Company* (1924), 263 U. S. 508. *General Pictures Company v. Electric Company* (1938), 304 U. S. 175. However, the decision on this point is clearly right.

There is no direct contradiction of the testimony of Fischel (R. 201-202) and Wachtel (R. 230) that the Seagram and Calvert "hold the line" policies were separately conceived, and the decisions to withhold shipments to Indiana, to avoid risk of participation in the illegal conspiracy of Indiana wholesalers, were separately made. (R. 204-205, 228.)

To support the jury verdict set aside by the Court of Appeals, petitioner relies upon (1) the financial relationship between Seagram and Calvert, (2) identical price policies simultaneously enforced, (3) "conferences" between officials of the various respondents, subsequent to the adoption of the policies, (4) delay by Calvert sales executives subordinate to Wachtel in announcing to petitioner the withholding policy already applied to others in Indiana, (5) alleged statements of Calvert sales executives that "we have to go along with Seagroups" or "with the other side of the house."

The complete integration (not mere "financial" relationship) of the United States subsidiaries of Distillers Corporation Seagram, Ltd., through the respondent Seagram's of Indiana, is not of itself a combination unlawful under Section 1 of the Sherman Act.⁴ As factual evidence of conspiracy this proves too much, since neither Distillers Corporation Seagram, Ltd., nor Seagram's of Indiana would be "conspiring" to adopt and enforce a sales policy for its own operations whether conducted through direct subordinates or wholly owned subsidiaries. (The complaint does not charge a conspiracy between respondents and Indiana dealers.)

Simultaneous identical action by two actors is not enough to prove conspiracy, absent evidence that it resulted from express or tacit agreement rather than separate reaction to similar circumstances.⁵ "Conferences" between the alleged conspirators are not enough.⁶

4. " * * * vertical integration, as such, without more, cannot be held violative of the Sherman Act." *U. S. v. Columbia Steel Co.* (1948), 334 U. S. 495, 525.

5. In *Johnson v. J. H. Yost Lumber Co.* (C. C. A. 8, 1941), 117 F. 2d 53, 61, the court upheld direction of a verdict in a conspiracy case where simultaneous identical action under similar circumstances was the principal "circumstance" relied upon. The court said:

"There must be substantial evidence furnishing some basis from which the alleged fact of such an agreement may reasonably be inferred. A fraudulent conspiracy may be shown by circumstantial evidence, but the facts and circumstances relied upon must attain the dignity of substantial evidence and not be such as merely to create a suspicion."

The eight competing distributors in *Interstate Circuit v. U. S.* (1939), 306 U. S. 208, each accepted a proposal made to all jointly, a conspiracy analogous to the separate signatures to a "round robin." This does not support petitioner's case here.

6. "In the instant action there is no evidence of conspiracy. Each of the defendants was a separate and independent financial institution dealing in automobile paper purchased from or pledged by the plaintiff. The mere fact that consultations were held by representatives of these two defendants relative to the status of plaintiff's account and that they acted at approximately the same

The "conferences" relied upon here took place *after* November 6th (R. 379, 383, 392), and after the "hold the line" decisions, and the decisions withholding Indiana shipments, had been made. (R. 233, 235.)

To infer combination, or the result of Seagram pressure, from Calvert's ~~delay~~ in breaking off negotiation for petitioner's new Calvert distributorship, after Calvert shipments to Indiana had ceased, is to make a wholly improbable guess as against more probable causes, one of which is supported by other evidence. Petitioner had never received Calvert merchandise, had itself asked deferred shipment of a previous order, and as yet there had been nothing to withhold. (R. 223, 224.) Schwalb continued negotiation for future shipments because he did not know when Indiana shipments would be resumed. (R. 221.)

If it is to be assumed that Schwalb (R. 81), Gollin and Tarpey (R. 82) gave the alleged assurances that the price change and the Seagram situation "would make no difference" because *they* thought that petitioner was to be permitted to make the resale price increases already denied to other Indiana wholesalers, this evidences *their* lack of knowledge of any contrary agreement with Seagram; disproof, rather than proof, of conspiracy. Certainly Wachtel, who had conceived the Calvert "hold the line policy," and its implementation, had not yet found it necessary to break with a prospective outlet, but this has no tendency to prove that the action subsequently taken was due to Seagram rather than to the separately conceived policy already operative against others.

Finally, the alleged "going along with Seagram" utterance to protect their respective interests because of duplication of securities does not warrant the inference of plaintiff that a conspiracy existed to injure his business, as charged in the complaint. The charge of conspiracy must be based upon something more substantial than suspicion.

Keller v. Commercial Credit Co. (1935), 149 Ore. 372, 376, 40 P. 2d 1018, 1021, 96 A. L. R. 1235, 1238.

ances of Schwalb and Reznik, if given their full hearsay relevancy, are merely descriptive of the Calvert decision as being identical with Seagram's and have no tendency to prove that it was due to Seagram compulsion or agreement. Schwalb and Reznik, as Calvert subordinates of Wachtel, had to follow Wachtel's directions, and Wachtel, not Seagram, made the Calvert policy. (R. 228, 232.)

All of this so-called evidence of "conspiracy" scarcely arises to the dignity of suspicion. *Absence* of combination is equally inferrable from each separate circumstance or their combination. "We, therefore, have a case belonging to that class of cases where proven facts give equal support to each of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover * * *." *Pennsylvania Railroad Co. v. Chamberlain* (1933), 288 U. S. 333, 339.

II.

The Court of Appeals Has Correctly Decided That Action by Sellers to Promote Resale Competition in Their Merchandise by Placing a Ceiling on Resale Prices is Not Restraint of Trade Under Section 1 of the Sherman Act.

The "restraint of trade or commerce" condemned by the Sherman Act is not accomplished merely by obstruction or prevention of interstate shipments. The "restraints" condemned are those directed to control of the market by suppression of competition in marketing. "The end sought was the prevention of restraints to free competition * * * which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services." "The history of the Sherman Act as contained in the legislative proceedings is

emphatic in its support for the conclusion that 'business competition' was the problem considered and that the Act was designed to prevent restraints of trade which had a significant effect on such competition." *Apex Hosiery Co. v. Leader* (1940), 310 U. S. 469, 493, and note 15 p. 493.

Petitioner's authorities, *Dr. Miles Medical Company v. John D. Park and Sons* (1911), 220 U. S. 373; *United States v. A. Schrader's Son, Inc.* (1920), 252 U. S. 85; *United States v. Trenton Potteries* (1927), 273 U. S. 392; and *United States v. Socony Vacuum Oil Company* (1940), 310 U. S. 150; all exhibit sellers' action calculated to restrain sellers' competition by raising, or placing a floor under sellers' prices. The Dr. Miles' scheme constituted illegal restraint because it destroyed competition between dealers.⁷ The Schrader device was condemned not merely because "designed to take away dealers' control of their own affairs," but because by so doing it "thereby" destroyed competition.⁸

The Socony conspiracy placed a "floor" under the market, which curtailed competition.⁹ Restriction of competition was also the decisive factor in the Trenton Potteries case.¹⁰ The rule that pricing which restrains competition is *per se* a restraint of trade, is not "limited" by recognition that pricing which promotes competition is *not* a restraint of trade.

7. "But agreements or combinations between dealers, having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void."

Dr. Miles Medical Co. v. Park & Sons Co. (1911), 220 U. S. 373, 408.

8. "• • • The parties are combined through agreements designed to take away dealers' control of their own affairs and thereby destroy competition • • •"

United States v. A. Schrader's Son, Inc. (1920), 252 U. S. 85, 99, 100.

9. *United States v. Socony Vacuum Oil Company* (1940), 310 U. S. 150, 220.

10. *United States v. Trenton Potteries Company, et al.* (1927), 273 U. S. 392, 395.

In the instant case, respondent's action in attempting to place a *ceiling*, not a floor, upon resale prices, was calculated to promote, not to restrain, sellers' competition. It was calculated to lower, not to raise prices; to benefit, not to harm, the consuming public. The supposed injury to petitioner and the liquor wholesaling "public", if existent, results from competition, not only not condemned, but on the contrary protected, by the Sherman Act. Hence the Court of Appeals properly held that the record exhibited no restraint of trade or commerce within the meaning of the anti-trust laws.

Petitioner's "Reasons for Granting the Writ" Misstate Both the Tenor and Effect of the Decision Below.

The Court of Appeals has not decided "that a combination to fix and coerce resale prices at temporarily lower levels than would result from a competitive market is not in violation of the anti-trust laws" (Petition for Certiorari, p. 10), but only that a combination of sellers to secure observance of maximum resale prices is not without more, a restraint of trade within Section 1 of the Sherman Act. No combination to "fix" or "coerce" prices at levels "lower than would result from a competitive market" was shown, but on the contrary the respondents (even if assumed to have acted in combination) acted to *make* their products *competitive* in the resale market, not in restraint of competition.

The Court's decision is only novel by reason of the novelty of petitioner's assertion that respondents' attempt to procure competitive resale prices and to *promote* resale trade by competition was by some abracadabra made "restraint" by reason of the fact that it dealt with prices. The so-called "fixing" of resale price has heretofore been condemned solely because of the suppression of competition between re-sellers with consequent enhancement of

consumer prices. To decide that action calculated to promote competition is not restraint and that lower prices are not to the consumer's detriment, does not substitute "the judgment of the court as to the consumer's interest, for the free market place." It merely refuses to apply the prohibition of restraint to that which is not restraint. That such competition may damage resale merchants by "squeezing" their margins, is a result of permitted competition, not restraint, and is irrelevant to consideration of whether or not "restraint", in violation of Section 1, exists or was attempted.

The so-called "private" O. P. A., conjured by petitioner from the decision of the Court of Appeals, bears no resemblance to its alleged prototype, since that institution restrained buyers' competition for sellers' goods, while the decision of the Court of Appeals merely recognizes the obvious; that to encourage and demand sellers' competition for a buyers' market is not a restraint of trade.

Nor does the decision legalize any "control" of "fixing" of prices requiring consideration of economic effects, except effects wholly outside the purview of the Sherman Act. Wholesalers were in no sense asked to sell at a *fixed* price; they were asked not to exceed a ceiling price. The imaginary economic evils which petitioner conjures from such "control" even if they existed, are not remediable as restraints of trade under the Sherman Act, because resulting not from restraint, but from promotion of resale competition by a device which, however novel, has never before been asserted to be unlawful. The effect of Section 1 of the Sherman Act is to forbid combination in restraint of competition,¹¹ which is all that has been decided.

11. *Apex Hosiery Co. v. Leader* (1940), 310 U. S. 469, 493, and note 15 p. 493.

United States v. Frankfort Distilleries (1945), 324 U. S. 293, 294, 296.

Conclusion.

Since the Court of Appeals has correctly held that the evidence does not support the charge of "combination" contained in the complaint, and that the combination asserted, even if proved, was not in "restraint of trade or commerce", the petition for certiorari should be denied.

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BRIEF FOR RESPON- DENTS

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SUPREME COURT, U.S.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1950.

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Respondents.

BRIEF FOR RESPONDENTS.

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CORPORATION,**

Respondents.

BRIEF FOR RESPONDENTS.

OPINION BELOW.

The opinion of the Court of Appeals reversing the District Court (R. 399) is reported at 182 F. 2d 228.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petitioner's brief.

QUESTIONS PRESENTED.

1. Whether combination of competing sellers to enforce *maximum* resale prices for their products shipped in interstate commerce is a combination in restraint of trade or commerce within the meaning of the first sentence of Section 1 of the Sherman Act. Act July 2, 1890, C. 647, Sec. 1, 26 Stat. 209, as amended Aug. 17, 1937, C. 690 Tit. VIII, 50 Stat. 693; U. S. C. A. T. 15 Sec. 1.

2. Whether the Court of Appeals erred in holding that evidence of combination or conspiracy was insufficient to support the jury's verdict.

(If, but only if, this Court should determine upon reversal of the Court of Appeals) 3. Whether or not other errors assigned but not considered by the Court of Appeals nevertheless require reversal of the judgment of the District Court.

STATUTES INVOLVED.

The following federal statutes are involved in consideration of the questions sought to be presented by the questioner:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: *Provided*, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, * * *"

Act July 2, 1890, C. 647, Sec. 1, 26 Stat. 209, as amended Aug. 17, 1937, C. 690 Tit. VIII. 50 Stat. 693; U. S. C. A. T. 15, Sec. 1.

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Act Oct. 15, 1914, c. 323, sec. 4, 38 Stat. 731; U. S. C. A. T. 15, Sec. 15.

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition

may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce."

Act Oct. 15, 1914, c. 323, sec. 7, 38 Stat. 731; U. S. C. A. T. 15, sec. 18.

The following Indiana Statutes are involved:

"Every scheme, design, understanding, contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce * * * is hereby declared to be illegal, * * *. Every person who shall make any such contract or engage in any such combination or conspiracy, or enter into any such scheme, design or understanding, * * * shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be fined in any sum not exceeding five thousand dollars (\$5,000), to which may be added imprisonment in the county jail or workhouse for a term not exceeding one (1) year, in the discretion of the court or jury trying the cause; * * *."

Indiana Acts 1907, Ch. 243, sec. 1, p. 490; 5 Burns Ind. Stat. 1933, sec. 23-116.

"No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which commodity is in free and open competition with commodities of the same general class produced or distributed by others shall be deemed in violation of any law of the state of Indiana by reason of any of the following provisions which may be contained in such contract:

(a) That the buyer will not resell such commodity at less than the minimum price stipulated by the seller.

(b) That the buyer will require of any dealer to whom he may resell such commodity an agreement that he will not, in turn, resell at less than the minimum price stipulated by the seller."

Indiana Acts 1937, Ch. 17, sec. 2, p. 53; 11 Burns Ind. Stat. 1933, sec. 66-302.

STATEMENT OF THE CASE.

Petitioner's complaint alleged that respondent Joseph E. Seagram & Sons, Inc., an Indiana corporation, had, on April 9, 1945, acquired all the stock of Calvert Distilling Company, with the effect of lessening competition between itself and Calvert, in violation of Section 7 of the Clayton Act. (R. 9.) It also alleged that following termination of O. P. A. liquor control, and after petitioner and other Indiana wholesalers had filed identical price increase schedules with the Indiana Alcoholic Beverage Commission, Seagram determined not to permit an increase in the resale price of its products; that by unlawful combination with Calvert, Seagram sought to withhold liquor from wholesalers who would not follow this resale price policy (R. 11); that by means of the influence resulting from such unlawful stock acquisition, Seagram did induce Calvert to enter into such combination (R. 14-15), and that as a result thereof and as a result of such stock acquisition petitioner was deprived of the respondent's liquor to its damage, etc. (R. 16.)

Respondents' answer denied that such stock acquisition lessened competition, denied any combination or conspiracy between respondents (R. 17-23), alleged affirmatively that the resale price increase was the result of a combination and conspiracy between petitioner and other Indiana wholesalers, and alleged that liquor was withheld from all Indiana wholesalers, including petitioner, to avoid participating in and aiding such illegal conspiracy, and to avoid the damage to respondents' trade-marks and good will which would have resulted from participation or acquiescence therein. (R. 23, 24.)

The case was tried to a jury (R. 28-29), under a charge to which respondents took numerous exceptions (R. 269,

270, 271, 272) and after 22 hours deliberation (noon, May 23—10 A. M., May 24, R. 273-279), followed by a sharp admonition to return a verdict (R. 276) and further deliberation of 2 hours (12:35, R. 279), the jury returned a verdict for \$325,000.

Petitioner is a wholesale drug and liquor dealer at Indianapolis, Indiana, and prior to November, 1946, was a distributor of the products manufactured and sold by the Seagram respondents. (R. 16, 20.) Subsequent to October 21, 1946, petitioner made tentative arrangements, never consummated, to become a distributor of the products of the Calvert respondents. (R. 38, 108.)

Respondents, at all times material, have, directly or indirectly, been the wholly owned subsidiaries of Distillers Corporation Seagram, Ltd., a Canadian corporation, which owns all the stock of respondent Joseph E. Seagram & Sons, Inc. Since 1945 the latter corporation, which manufactures distilled spirits, has owned all the stock of Seagram Distillers Corporation and of Calvert Distilling Co. The latter, also a manufacturer, owns all the stock of Calvert Distillers Corporation. Seagram Distillers Corporation and Calvert Distillers Corporation are respectively the sellers and distributors of the products of their immediate parents. (R. 280-281.)

Prior to April 9, 1945, the entire stock of Calvert Distilling Company had been held by Distillers Corporation Seagrams, Ltd., which also held the entire stock of Joseph E. Seagram & Sons, Inc., and the allegedly unlawful acquisition of Calvert stock by the latter was the result of transfer of the Calvert stock from the parent to another wholly owned subsidiary. (R. 8, 9, 18.) Uncontradicted proof showed that this stock acquisition had no effect on competition; that operating control of the Calvert companies remained unchanged. (R. 151-2.) Nevertheless, the trial court refused to withdraw the issue of Clayton Act

violation from the jury (Defendants refused request #3, R. 354, exception to refusal R. 269), and both during the reception of evidence (R. 209, 210, 227, 233, 234) and in the charge (R. 262) commented adversely upon its effect and called attention to its importance. The court's charge also defined conspiracy as an "agreement . . . to accomplish a lawful object by unlawful means" (R. 266) and authorized recovery by petitioner if the jury should find the conspiracy "alleged" or "charged". "in the complaint." (R. 266, 267, 268.)

When O. P. A. liquor price control terminated in October, 1946, Fischel, sales executive of Seagram, determined not to raise prices and to ask all dealers to conform. (R. 201-202.) Wachtel, Calvert President, made like determination. (R. 230.) These decisions were reached separately, and not discussed between the companies until subsequent to November 6, 1946. (R. 232, 235.) The Seagram policy was announced to all wholesalers by telegram November 6, 1946. (R. 393.) Calvert also made public announcement in the press.¹ (R. 230, 246.)

Conspiracy of Indiana Wholesalers.

The Indiana Wholesale Liquor Dealers Association included every such wholesaler in Indiana. (R. 155.) This Association held a meeting October 31, 1946 (R. 157) at which all but one of the members was represented. (R. 158.) Price changes made possible by the termination of O. P. A. control were openly discussed at that meeting, particularly by petitioner's President, G. Barrett Moxley, and by a representative of the Indiana Alcoholic Beverage Commission, and by counsel for one of the wholesalers. (R. 49, 60-66.) At this meeting Moxley announced peti-

(1) The Court of Appeals is in error in asserting that, "No policy was ever announced by Calvert other than that it would follow the Seagram policy." (R. 409.)

tioner's intention of adopting a 15% over-all markup (R. 48) which was apparently unanimously accepted by all present.

About November 1, 1946, immediately following the October 31 meeting, practically all Indiana liquor wholesalers, including petitioner (R. 308), filed simultaneous notifications of identical resale price increases (15% over-all markup) with the Indiana Alcoholic Beverage Commission. (Defts.' Exs. 1-22, inc., R. 299-322, introduced, R. 163, 164, 165.)

Petitioner's liquor buyer Lutz told Bernbach, Seagram representative, that all distributors had agreed at the October 31 meeting to file a new and increased price schedule. (R. 194.) Offers to prove similar declarations by other Indiana wholesalers were excluded. (R. 191, 194, 195.)

Upon learning of the action of the Indiana wholesalers Fischel, for Seagram ordered Indiana shipments discontinued. (R. 204, 205.) Wachtel, for Calvert, did likewise. (R. 228.) Both took this action to avoid complicity in an illegal conspiracy of Indiana wholesalers. (R. 204, 228.) Both respondent sales companies and Fischel, individually, had been convicted for participation in a similar conspiracy of Colorado wholesalers. (Defts.' Exs. 23, 24, R. 324, 341, 342, 346; introduced, R. 213.) Seagram advised all Indiana distributors that no more shipments would be made until they "went along with our program," to "hold the line" on prices. (R. 196.) Calvert shipments to Indiana ceased at "the end of the first week or the beginning of the second week "in November, 1946." (R. 221.) "Conferences" between Seagram and Calvert officials concerning this action were held after, but not before the decisions were made. (R. 379, 383, 391, 392, 232, 235, 246.)

Schwalb, Calvert's Central Division Manager, in person, and Gollin, Assistant Sales Manager, by telephone, continued negotiation as to petitioner's new Calvert distributorship, through November 12, 1946. (R. 97.) Schwalb made detailed arrangement for petitioner to become a Calvert distributor after cessation of Calvert Indiana shipments because he "did not know when we would start shipments, a week, two weeks, three weeks, three months." (R. 221.) Petitioner had never received any Calvert merchandise, and itself had requested deferred shipment of an order already placed. (R. 223, 224.) November 19, 1946, Schwalb notified Moxley, petitioner's President, that the order would be cancelled. (R. 217-218.) Moxley testified that this notice was accompanied by the statement that "we have to go along with Seagram" (R. 40), and that Calvert's general sales manager, Reznik, gave as a reason that they "had to go along with the other side of the house." (R. 41.) Schwalb and Reznik corroborated the refusal but denied the reason given. (R. 218, 240.) Wachtel had determined the Calvert "hold the line policy," not Gollin, Reznik or Schwalb. (R. 228.)

SUMMARY OF ARGUMENT.

I. The Court of Appeals Correctly Decided That There Was Insufficient Evidence of Illegal Conspiracy or Combination to Support the Jury's Verdict.

The combination alleged was one between the respondents only—not between respondents and dealers. Direct evidence shows that the substantially identical Calvert and Seagram policies were separately conceived and announced and their implementation by withholding shipments from Indiana dealers engaged in a price-fixing conspiracy separately determined.

All the circumstances relied upon to establish a conspiracy in the face of this direct evidence to the contrary are at least equally susceptible of a contrary inference and are insufficient to give rise to more than suspicion. Respondents' corporate affiliation is more cogent to disprove unlawful collusion than to support it. Neither the substantial identity of action, nor the "conferences" (exchange of information) between respondents amount to evidence of conspiracy. The delay in announcing final refusal to consummate petitioner's proposed Calvert distributorship is more logically attributable to lack of administrative co-ordination, or to hope of early peace with Indiana wholesalers, than to combination with Seagram; and moreover shows lack of previous agreement rather than combination. The so-called "admissions" of Calvert representatives only describe the action taken, and do not assert or tend to prove combination with Seagram.

The substantial evidence required to sustain a jury verdict must consist of more than suspicion. Here the most that can be found are circumstances all equally susceptible

of contrary inferences; hence petitioner having the burden of proof, must fail.

II. The Court of Appeals Has Correctly Decided That Action by Sellers to Promote Resale Competition in Their Merchandise by Placing a Ceiling on Resale Prices is Not Restraint of Trade Under Section 1 of the Sherman Act.

The alleged combination here in question does not exhibit any of the features heretofore held to violate Section 1 of the Sherman Act.

The "restraint of trade or commerce" condemned by the Sherman Act must restrain competition. The alleged "restraint" here present was not a "restraint" of competition but the reverse. It is not condemned by decisions that condemn "price-fixing" in restraint of competition. It was pricing to promote competition, and its legality does not require an appeal to the "reasonable restraint" doctrine. Respondents did not "fix" an absolute price but on the contrary acted to fix a price ceiling on their own sellers' market. The supposedly undesirable economic results claimed to result do not establish violation of the Sherman Act. Such results flow from competition, which the Sherman Act is designed to preserve. The fact that action by *buyers* to depress prices restrains competition does not prove that *sellers'* action to depress prices is restraint of trade, but the reverse. Price competition in aid of monopoly is not here involved. Since respondents' action has been to promote rather than to suppress competition, they have not violated section 1, whether acting singly or in combination.

III. Prejudicial Errors Committeed by the Trial Court Require Reversal of Its Judgment, Regardless of the Disposition of the Questions Presented in the Petition for Certiorari.

The alleged violation of Section 7 of the Clayton Act was supported by no evidence, and failure to withdraw this issue from the jury was erroneous both under the practice of Federal Courts and the courts of Indiana. This refusal was highly prejudicial, not only because it left the jury free to find a section 7 violation but also because the Clayton Act violation was alleged as a means of accomplishing the section 1 violation, and the jury may, and probably did, convict respondents upon the basis of the admitted stock acquisition, admittedly an innocent transaction.

The illegal conspiracy of Indiana wholesalers alleged in the answer was established by substantial evidence, and the trial court erred in charging that this, even if established, constituted no defense. Respondents had justifiably refused Indiana shipments to avoid participation in this illegal enterprise, and were not guilty of "restraint of trade" in so doing whether acting separately or in combination. Moreover the damages alleged consisted of the profits lost by reason of deprivation of merchandise which petitioner proposed to resell in violation of the anti-trust laws of the State and nation, and were not recoverable under the civil damage section of the anti-trust law, which protects only legal business.

The trial court also erred in admitting evidence relevant only to show respondents' wealth and great size since punitive damages were not recoverable and evidence relevant only to the issue of punitive damages was obviously highly prejudicial. The trial court also erred in ad-

mitting auditors' calculations based upon books and records not in evidence and not produced and in permitting a witness to guess at the proportionate part of petitioner's lost profits attributable to loss of respondents' merchandise.

ARGUMENT.

I. The Court of Appeals Correctly Decided That There Was Insufficient Evidence of Illegal Conspiracy or Combination to Support the Jury's Verdict.

The complaint alleged a combination or conspiracy between the named respondents (R. 14), not between the respondents, or any of them and any wholesaler or wholesalers.

No matter how thinly sliced, or in how many pieces, or in what order reassembled, the very ~~simple~~ factual picture shown by the record is this:

At the termination of O. P. A. price controls on liquor, Fischel, chief sales executive of Seagram, and Wachtel, President of Calvert, *separately* determined *not* to increase existing prices on their products, and to ask all retailers and wholesalers to do likewise. (R. 201-202, 230, 232, 235.) The Seagram decision was announced by telegram of November 6, 1946, to all wholesalers. (R. 393.) The Calvert policy was published in the press. (R. 230, 246.) Almost simultaneously, each learned that Indiana wholesalers, in apparent concert of action had filed and announced *identical* price *increases* on all alcoholic beverages; and each ordered further shipments to Indiana wholesalers discontinued. (R. 204-205, 228.) Petitioner, previously a Seagram distributor, was advised that *no* more Seagram products would be shipped until it "went along with our program" to "hold the line" on prices. (R. 196.) Petitioner had never received any Calvert products and itself had requested deferred shipment of the only Calvert products previously ordered. (R. 223, 224.) Until after November 13, petitioner continued negotiations with Schwalb,

Calvert's western division manager, in person (R. 97), and possibly with Gollin, sales manager, by telephone (R. 97, but cf. R. 226, 227), for the sale of Calvert products to petitioner. (R. 97, 226.) Schwalb continued these negotiations after all Indiana shipments had been stopped because he "did not know when we would start shipments, a week, two weeks, three weeks, three months." (R. 221.) November 19, Schwalb notified petitioner that petitioner's order would be cancelled, saying, according to Moxley, that "we have to go along with Seagram." (R. 40.) Moxley ascribed similar language to Reznick, viz., "he had to go along with the other side of the house." (R. 41.)

Seagram and Calvert officials "conferred" with respect to the "delivery or non-delivery of Calvert products to plaintiff and Indiana wholesalers" between November 6, 1946, and February 3, 1947. (R. 379, 391, 392.) These conferences were had after, not before, cessation of Indiana shipments had been determined by both. (R. 232, 235, 246.)

The sum and substance of the whole is that under similar circumstances, with respect to a similar situation, two respondents took substantially identical action with respect to Indiana liquor wholesalers, including petitioner. This is not sufficient evidence of conspiracy.²

The nine circumstances relied upon by petitioner, listed on pages 19 and 20 of petitioner's brief, in so far as they accord with record facts, afford no inference of conspiracy.

(2) In *Johnson v. J. H. Yost Lumber Co.* (C. C. A. 8, 1941), 117 F. 2d 53, 61, the court upheld direction of a verdict in a conspiracy case where simultaneous identical action under similar circumstances was the principal "circumstance" relied upon. The court said:

"There must be substantial evidence furnishing some basis from which the alleged fact of such an agreement may reasonably be inferred. A fraudulent conspiracy may be shown by circumstantial evidence, but the facts and circumstances relied upon must attain the dignity of substantial evidence and not be such as merely to create a suspicion."

(1) That the respondents are bound by "close corporate affiliation" is a curious understatement. Three of the corporate respondents are wholly owned subsidiaries of the fourth, which in turn is the wholly owned subsidiary of a fifth not joined. Such "affiliation" is not of itself an unlawful combination (*U. S. v. Columbia Steel Co.* (1948), 334 U. S. 495, 525), and identical action by the right and left arms of such an entity is more logically ascribable to the probability of identical thinking by identical twins rather than to *unlawful* concert between parts only nominally separate. Certainly the "affiliation", as well as the common occupancy of a single building, show at most opportunity to conspire, not combination in fact.

(2) "That Seagram determined to fix resale prices at previous O. P. A. levels and punished the petitioner for refusing to adhere to its policy by suspending shipments", also described the action taken by Calvert with respect to all of its Indiana wholesalers. Calvert had already imposed like "punishment" upon all its Indiana wholesalers. That the Calvert ax later fell upon petitioner has no tendency to suggest that combination with Seagram was responsible rather than the separately conceived Calvert policy previously effective against others.

(3) "That Calvert, admittedly a Seagram competitor, and aware of the Seagram policy, determined to expand its distribution in Indiana through petitioner, without any control over resale prices;" distorts the record. Testimony that *Schwalb* determined to expand Calvert distribution without control of resale prices does not establish that *Calvert* so determined, since *Wachtel* determined the Calvert policy. *Wachtel* had previously determined to suspend shipments to *all* Indiana wholesalers engaged in a collusive effort to advance prices. (R. 228, 231.) There is no evidence that he had determined to except petitioner. Furthermore, even if *Calvert* changed its mind, to ascribe

such change to *conspiracy*, rather than its own independent thinking, is pure speculation.

(4) That "conferences" were held with reference to supplying petitioner (as well as other Indiana wholesalers) does not afford basis for inference that the identical action *previously determined* (R. 232, 235, 246), was perpetuated by conspiracy.³

(5) "That Calvert over-night reversed its attitude toward the petitioner and refused shipments" is not true. As pointed out, Wachtel, not Schwalb, was "Calvert" with respect to the decision not to implement the Indiana wholesalers' conspiracy with Calvert merchandise; and there is no scintilla of proof that Wachtel "reversed" his attitude. Moreover, change of policy does not suggest combination, absent evidence that Seagram was responsible. Assuming a "reversal", contemplation of the commercial effect of supplying a new distributor, also guilty of the practice for which old ones were suspended, may more logically be inferred than conspiracy.

(6) "That Seagram and Calvert (but no other distillers) made identical resale price demands," and took identical action to implement this policy, is again a repetition of the identity of action theory, and nothing more.

(7) "That Seagram and Calvert in an identical manner terminated petitioner's distributorship," etc., exhibits

(3) "In the instant action there is no evidence of conspiracy. Each of the defendants was a separate and independent financial institution dealing in automobile paper purchased from or pledged by the plaintiff. The mere fact that consultations were held by representatives of these two defendants relative to the status of plaintiff's account and that they acted at approximately the same time to protect their respective interests because of duplication of securities does not warrant the inference of plaintiff that a conspiracy existed to injure his business, as charged in the complaint. The charge of conspiracy must be based upon something more substantial than suspicion."

Keller v. Commercial Credit Co. (1935), 149 Ore. 372, 376, 40 P. 2d 1018, 1021, 96 A. L. R. 1235, 1238.

again the identity of action argument, although with strangely inconsistent inaccuracy. Petitioner was not "terminated" as a Calvert distributor since it was never "initiated"; and the absence of complete identity of manner, in that Calvert delayed about two weeks in breaking with petitioner, is elsewhere urged as indicating collusion.

(8) That "Calvert told petitioner that . . . 'it had to go along with Seagrams, the other side of the house' . . .", if given full hearsay relevancy against Seagram, serves merely to describe the action being taken.⁴ This is not an assertion, and affords no basis for an inference, that such action was the result of combination with Seagram rather than Calvert's independent adoption of an identical policy. Calvert had been "going along with Seagram" with respect to other Indiana wholesalers. That petitioner may have had contrary hope with respect to itself has no tendency to suggest that the blasting of that hope was the result of combination.

The chain of reasoning by which petitioner seeks to support an inference of conspiracy from this evidence is, briefly, that because Seagram and Calvert had motive and opportunity to combine, and took identical action, therefore the identical action resulted from combination. Strangely enough, it is also strenuously argued that Calvert had motive *not to combine*, in that it might through petitioner have taken away from its twin a part of Sea-

(4) The lack of probative force in this hearsay evidence makes it seem unnecessary to discuss its admissibility against Seagram defendants. However, the Court of Appeals was clearly right in stating that it was not proof against Seagram. (R. 405-406.) Since admissible against Calvert, *separate* objection by the Seagram defendants would have been wholly unavailing in Indiana. *Young v. State* (1923), 194 Ind. 345, 350. The sole remedy was a limiting instruction. It was scarcely necessary, in twice moving for a directed verdict (R. 149, 269, 354) also to request the trial judge to *instruct himself* to disregard hearsay properly admitted against Calvert, but wholly inadmissible against Seagram, absent other proof of conspiracy.

gram's Indiana market. Of course, it is also clear that both respondents separately had "motive" to expand their distribution when competitors' prices were rising, by keeping their consumer prices highly competitive at the old O. P. A. level, and that this "motive" is sufficient to account for the identical action taken.

The fact that "conspiracy" like intent, is often difficult to establish by the direct testimony of observers or participants has not as yet, we believe, given conspiracy complainants such a preferred position that they may substitute for logical proof mere guess and speculation.⁶ To guess a cause from an effect is no more permissible than to guess an effect to be the result of a cause.

Concerning the latter this Court has said:

"But proof of negligence alone does not entitle the plaintiff to recover under the Federal Employers' Liability Act. The negligence complained of must be the cause of the injury. The jury may not be permitted to speculate as to its cause and the case must be withdrawn from its consideration unless there is evidence from which the inference may reasonably be drawn that the injury suffered was caused by the negligent act of the employer. * * *

Atchison, Topeka & Santa Fe Ry. v. Toops (1930),
281 U. S. 351, 354-5.

On this record every single circumstance relied upon to show "conspiracy" may, with equal if not superior logic, be made the basis of an opposite inference. "We, there-

(6) The language in *Interstate Circuit v. United States* (1939), 306 U. S. 208, 221, cited by petitioner (brief p. 24), was applied, not merely to "identical action" but to the simultaneous acceptance by eight motion picture distributors of a proposal made jointly to all, without disclosure as to whether or not by mutual agreement. On the present record there was no joint proposal, and further both Seagram and Calvert executives testified that the identical policies were *not* the result of agreement but separately conceived.

fore, have a case belonging to that class of cases where proven facts give equal support to each of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover * * * *Pennsylvania Railroad Co. v. Chamberlain* (1933), 288 U. S. 333, 339.

Moreover, even if this court should conclude that there was evidence to support inference of combination among respondents viewed as independent traders, their status as mere instrumentalities of a single manufacturing-merchandizing unit precludes the possibility of any "conspiracy" condemned by the Sherman Act. The respondent companies are all completely controlled and integrated units of a single manufacturing and distributing enterprise, and the fact that these various divisions adopted identical policies of pricing and customer selection could indicate "conspiracy" only in the sense that those executives jointly responsible jointly reached a decision.

It is true that this Court and the Court of Appeals for the Seventh Circuit have held that affiliated corporations may combine in violation of the Sherman Act by agreements coercively restraining trade of third parties or designed to achieve monopoly.

U. S. v. Yellow Cab Company, 332 U. S. 218 (1947).

U. S. v. Crescent Amusement Co., 323 U. S. 173 (1944).

Schine Chain Theatre, Inc. v. U. S., 334 U. S. 110 (1948).

U. S. v. Griffith, 334 U. S. 100 (1948).

U. S. v. General Motors Corporation, 121 Fed. 2d 376 (C. C. A. 7, 1941); cert. den. 314 U. S. 618 (1941).

U. S. v. New York Great Atlantic & Pacific Tea Co., 173 Fed. 2d 79 (C. A. 7, 1949).

However, this Court has never held that agreements among wholly owned subsidiary corporations of the same parent or parallel action by such subsidiaries with respect to a voluntary act of restraint of trade, such as establishment of maximum prices, constitutes conspiracy under the Sherman Act.

Indeed, when this Court, in *U. S. v. Yellow Cab Company*, *supra*, discussed the alleged agreement between two of the affiliated corporations not to compete for railroad business, its opinion indicated that the only reason for upholding the charge of actionable conspiracy was that it was alleged that corporate affiliations had been used as a means to carry out a pre-existing conspiracy, stating at page 229:

“* * * Moreover, the fact that the competition restrained is that between affiliated corporations can not serve to negative the statutory violation where, as here, the affiliation is assertedly one of the means of effectuating the illegal conspiracy not to compete.”

In addition this Court has indicated that it does not hold illegal all agreements between affiliated corporations which might be illegal if the corporations were not affiliated.

In *U. S. v. Columbia Steel Company*, 334 U. S. 495 (1948) the government relied upon *U. S. v. Yellow Cab Co.*, *supra*, to support the argument that it was illegal *per se* for a manufacturer to pre-empt any market for his goods through vertical integration provided that an appreciable amount of interstate commerce is involved. In holding this argument was not well founded, this Court stated at pages 521-522: “We do not construe our holding in the *Yellow Cab* case to make illegal the acquisition by U. S. Steel of this outlet for its rolled steel without consideration of its effects on the opportunities of other competitor producers to market their rolled steel.

“In discussing the charge in the *Yellow Cab* case we said

that the fact that the conspirators were integrated did not insulate them from the act, not that corporate integration violated the act."

Again this Court stated at page 523: "A subsidiary will in all probability deal only with its parent for goods the parent can furnish. That fact, however, does not make the acquisition invalid. Whenever elements of Sherman Act violations are present, the fact of corporate relationship is material and can be considered in the determination whether restraint or attempts to restrain exists."

We submit that the doctrine which this Court has applied with respect to the status of corporate affiliation or integration as a defense to a charge of restraint of trade is that the nature of the restraint, *i.e.*, whether it is of a voluntary nature which merely eliminates competition between the parties, or whether it is of a coercive nature that has an effect upon third parties, is determinative.

It seems clear that this Court must make the distinction which it has made between voluntary and coercive restraints of trade for unless it does so the inevitable result will be that no corporation can have a uniform price policy for its various divisions, as the mere fact of discussion and agreement regarding price by members of the Board of Directors and the various executives of the corporation may otherwise involve a violation of the Sherman Act. (Executives charged with pricing both Buicks and Cadillacs are quite vulnerable.) In addition, a decision by this Court that wholly owned subsidiaries of the same parent corporation may violate the law because of an agreement with respect to prices will sound a death knell to the widespread business practice of doing business through subsidiary companies. If such a drastic result is to be achieved, we submit that it should be taken by the Congress rather than by this Court, as this Court indicated with respect to corporate integration in *U. S. v. Columbia Steel Company, supra*, where it stated

at page 526: "If businesses are to be forbidden to enter into different stages of production, that order must come from Congress not the Court."

In addition, a holding that a conspiracy with regard to prices is possible among corporate subsidiaries of the same parent corporation would result in exalting form over substance, which this Court in *U. S. v. Yellow Cab Company*,^{*} *supra*, stated should not be done in enforcing the Sherman Act when it stated at page 227: "That statute (the Sherman Act) is aimed at substance rather than form."

In this type of case the doctrine of single trader is particularly appropriate and necessary to be applied to parent and wholly owned subsidiaries. When the executives controlling the pricing and sales policies of the single unit comprised by these separately named respondent companies determined to act to keep prices down, they were not guilty "conspirators" unless the policy upon which they resolved was itself unlawful.

II. The Court of Appeals Has Correctly Decided That Action by Sellers to Promote Resale Competition in Their Merchandise by Placing a Ceiling on Resale Prices is Not Restraint of Trade Under Section 1 of the Sherman Act.

The alleged combination here in question does not exhibit any of the features heretofore held to violate Section 1 of the Sherman Act. The complaint does not allege a combination to monopolize or an attempt to monopolize or other violation of Section 2 of the Sherman Act.⁷ The

^{*}See Adelman "Effective Competition and the Anti-Trust Laws" 61 Harvard Law Review 1289, at page 1317 (1948).

(7) *Swift & Co. v. United States*, 196 U. S. 375, 391;
American Tobacco Co. v. United States, 147 F. 2d 93 (C. A. 6).

combination alleged is not a combination of sellers to fix a minimum on their own prices, or upon the resale prices of their goods.⁸ It is not alleged that producers have combined with dealers to place a floor under resale prices and restrain competition among dealers.⁹ It is not alleged that producers have combined to raise the market price of the products sold by concerted buying programs designed to create an artificial and high market price.¹⁰ It is alleged that producers have combined "in restraint of trade" by refusing to deal with wholesalers who refuse to compete in the resale market by observing a *maximum*, not a minimum resale price on the producers' products.¹¹

No attempt is made, either in the brief of petitioner or in the brief of *amicus curiae* to resolve this paradox with either the ordinary meaning of the words "restraint of trade," as found in section 1 of the Sherman Act, or with oft repeated judicial definitions of the term.

The "restraint of trade or commerce" condemned by the Sherman Act is not accomplished merely by obstruction or prevention of interstate shipments. The "restraints" condemned are those directed to control of the market by suppression of competition in marketing. "The end sought was the prevention of restraints to free competition" * * * which tended to restrict production, raise prices or other-

(8) *United States v. Trenton Potteries* (1927), 273 U. S. 392.

(9) *Dr. Miles Medical Co. v. Park & Sons Co.* (1911), 220 U. S. 373, 408;

U. S. v. Frankfort Distilleries (1945), 324 U. S. 293;

U. S. v. A. Schrader's Son, Inc. (1920), 252 U. S. 85.

(10) *U. S. v. Socony Vacuum Oil Company* (1940), 310 U. S. 150.

(11) The complaint did not charge and the evidence does not support an inference, that the "fair trade" contracts of 1947 had any connection with the "hold the line" efforts of 1946. Fair trade contracts were made a prerequisite to "price and brand" advertising by regulation of the Indiana Alcoholic Beverage Commission which became effective July 1, 1947, and their purpose was simply to legalize such advertising. R. 214.

wise control the market to the detriment of purchasers or consumers of goods and services." "The history of the Sherman Act as contained in the legislative proceedings is emphatic in its support for the conclusion that 'business competition' was the problem considered and that the Act was designed to prevent restraints of trade which had a significant effect on such competition." *Apex Hosiery Co. v. Leader* (1940), 310 U. S. 469, 493, and note 15 p. 493.

Petitioner's authorities, *Dr. Miles Medical Company v. John D. Park and Sons* (1911), 220 U. S. 373; *United States v. A. Schrader's Son, Inc.* (1920), 252 U. S. 85; *United States v. Trenton Potteries* (1927), 273 U. S. 392; and *United States v. Socony Vacuum Oil Company* (1940), 310 U. S. 150; all exhibit sellers' action calculated to restrain sellers' competition by raising, or placing a floor under sellers' prices. The Dr. Miles' scheme constituted illegal restraint because it destroyed competition between dealers.¹² The Schrader device was condemned not merely because "designed to take away dealers' control of their own affairs," but because by so doing it "thereby" destroyed competition.¹³

The Socony conspiracy placed a "floor" under the market, which curtailed competition.¹⁴ Restriction of competi-

(12) "But agreements or combinations between dealers, having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void."

Dr. Miles Medical Co. v. Park & Sons Co. (1911), 220 U. S. 373, 408.

(13) "• • • The parties are combined through agreements designed to take away dealers' control of their own affairs and thereby destroy competition. • • •"

United States v. A. Schrader's Son, Inc. (1920), 252 U. S. 85, 99, 100.

(14) *United States v. Socony Vacuum Oil Company* (1940), 310 U. S. 150, 220.

Defendants in the above case were producer sellers of gasoline whose selling prices were pegged to the spot market, and the indictment charged that they had combined to raise their own selling

tion was also the decisive factor in the *Trenton Potteries* case.¹⁵ The rule that pricing which restrains competition is *per se* a restraint of trade, is not "limited" by recognition that pricing which *promotes* competition is *not* a restraint of trade.

In the instant case, respondent's action in attempting to place a *ceiling*, not a floor, upon resale prices, was calculated to promote, not to restrain, sellers' competition. It was calculated to lower, not to raise prices; to benefit, not to harm, the consuming public. The supposed injury to petitioner and the liquor wholesaling "public," if existent, results from competition, not only not condemned, but on the contrary protected, by the Sherman Act. Hence the Court of Appeals properly held that the record exhibited no restraint of trade or commerce within the meaning of the anti-trust laws.

Petitioner's argument to the contrary studiously refrains from pointing out in what manner trade has been "restrained" by any suppression of competition. Reliance is placed wholly upon language of decisions where the facts exhibited suppression of competition by *minimum* prices agreed upon between producers or jobbers, or *minimum* prices enforced upon resellers, with the obvious result of blunting the most effective competitive weapon of sellers,

prices by a concerted program of buying distress gasoline in the spot market. Hence the pronouncement of the opinion as to illegality of combination to depress or lower prices is dictum as applied to the indictment. However, had the defendants, as *buyers* combined to *depress* the spot market they would have been equally guilty, but not under the indictment returned. The statement of the opinion as applied to a buyer-seller combination is therefore good law since such a combination may restrain trade by "price-fixing" either up or down and to the extent that buyers were competitors for the distress gasoline, depressing the price would restrain competition. But the case is not authority for the proposition that sellers' action to promote competition by a price ceiling is a restraint of trade.

(15) *United States v. Trenton Potteries Company* (1927), 273 U. S. 392, 395.

i. e.—offering more for the same money or the same for less money. The able documentation of the doctrine that prices fixed or agreed upon in restraint of competition are not saved from the proscription of the Sherman Act by their “reasonableness” is simply demolition of a man of straw, since these respondents did not restrain, but *promoted* competition; and their action requires no appeal to the saving doctrine of “reasonableness.”

The make weight assertion that what the respondents did was to “fix the absolute resale prices for their products” is an attempt to inject into the case an imaginary “price fixing” arrangement not asserted in the pleadings. Long after respondents had succeeded in their endeavor to keep their consumer prices competitive at former O. P. A. levels, respondents entered into fair trade contracts entirely lawful under the Miller-Tydings amendment.¹⁶ If these suppressed competition it was lawful suppression. It is also contended that the announcement of November 6 (R. 393) that Seagram had decided to maintain former prices on all brands was the “fixing” of a minimum. The annexed appeal to prevent a *price rise*, dispels any such interpretation. Indeed, the Court of Appeals was clearly right in saying that there was no evidence of an attempt to “fix” a price, only to *prevent an increase in price*. (R. 411, 412.)

But the dominant fallacy in petitioner’s argument springs from the false assumption that the proscription of “restraint of trade” in some manner guarantees wholesalers from the effects of lawful competition, or that the Sherman Act prohibits methods of competition which restrict middlemen’s margins.

Enforcing a resale price ceiling circumscribes the dealer’s freedom to exact all that the traffic will bear but it

(16) The Indiana law making “fair-trade” lawful is set out under “Statutes Involved”.

does not limit his freedom to compete. Freedom to compete, not freedom from competitive pressure, is the freedom which the Sherman Act guarantees. The restraint on "freedom of trade on the part of dealers" mentioned in *Dr. Miles*, and on "dealers' control of their own affairs" in *Schrader* was the restraint on their *ability to compete* imposed by a price minimum. "Coercion" of dealers to restrain their *competitive* freedom is condemned, not coercion which makes effective competition in their supplier's goods a condition of their continued supply.

This is not to say that "the opportunity of distributors to make profits is unimportant in the competitive system" or otherwise. It is simply to say that Section 1 of the Sherman Act does not inhibit competitive devices, which for the very reason that they promote and do not inhibit competition, do not restrain trade. *Promotion* of competition cannot properly be called "restraint of trade" merely because of the effect of such devices on the middleman, or because of fear of "absentee control of business," or because of the bugaboo of the "large producer dominant in the market." The evils (we believe imaginary) alleged to result to the "competitive system" from the refusal of the Court of Appeals to expand "restraint of trade" to cover that which is obviously not restraint, if they exist, are better to be remedied by Congress or the F. T. C. than by judicial inversion of the language of the Sherman Act.

A more subtle fallacy is exhibited by the brief of the Solicitor General, *Amicus Curiae*. On pages 5-6 it is said:

"* * * Low prices are not, as such an objective of the statute. This seems apparent if consideration is given to a combination among buyers to depress the price at which they purchase. The Act is designed to permit sellers to dispose of their goods in a market free from combination among buyers to keep prices low; just as it is also designed to permit buyers to purchase in a market free from combination among sellers to enhance or maintain prices."

It is, of course, true that "low prices are not as such, an objective of the statute," nor are high prices. Seller's price competition lowers prices, buyer's price competition raises prices. The "objective of the statute" is to prevent restraints upon the competition of either group, to inhibit combinations of buyers to depress the prices at which they buy, or of sellers to increase the prices at which they sell. But to attempt the above inversion and assert that because buyers who combine to depress prices restrain trade, therefore *sellers* who *depress* prices also restrain trade, is to assert the identity of opposites.

Here it is not alleged that there is a "combination among buyers to depress the price at which they buy," nor that there is "a combination among sellers to enhance or maintain prices." On the contrary, it is absurdly charged that sellers have *restrained* trade by attempting to hold down the prices at which their goods may be sold. Rather than having acted to restrain trade these respondents adopted a highly competitive marketing program to promote the sale of their own goods.¹⁷

The price depressing combination of live stock *buyers* exhibited in *Swift & Co. v. United States*, 196 U. S. 375, 391, and of tobacco *buyers*, condemned in *American Tobacco Co. v. United States*, 147 F. 2d 93, were restraints of trade because they suppressed *competition* among *buyers*. While it is obvious that price ceilings restrain buyers' competition, it requires price floors to restrain sellers' competition.

We believe the Solicitor General is in error in asserting the similarity or applicability of the resale price feature

(17) The record indicates the effectiveness of this form of competition. In the face of a more than 30% decline in the liquor business beginning in 1947 (R. 140), respondent Seagram's volume (cases) increased over 30% in 1947, and a further 50% in 1948. R. 391. The Calvert increase, while less, was substantial, particularly in dollars. R. 391.

of the *Tobacco* case to the one here involved. The device there adopted was alternative, 13 cents on defendant's brands or 11 cents on competing 10-cent brands. The latter alternative was clearly a *restraint* on competition with other stores. Moreover, the resale pricing exhibited by the *Tobacco* case was but one of many devices found to have been the instruments of an attempt to achieve illegal monopoly, a violation of Section 2 of the Sherman Act, which is not here involved. The *Tobacco* case does not hold that the resale price program was of itself a restraint of trade.

The present complaint does not charge a violation of the monopoly section of the Sherman Act, nor price ceilings on food products, but nevertheless the Solicitor General argues that to sanction maximum resale pricing might result in confining trade in food products to super markets. Such an argument might be relevant to a charge of *monopolization*, but it has no tendency to establish that resale maximums *restrain* trade.

The present complaint does not charge that respondents combined to maintain (keep up) their own prices, and the evidence shows that their prices were held down, while other distillers advanced. (R. 193, 196.) The argument that resale maximum prices provide "a ready instrumentality for maintaining the sellers' own prices," is therefore inapplicable either to the pleadings or evidence. Respondents did not "maintain" their own prices except to *maintain* the old ceiling in the face of a general advance.

What respondents did "maintain" was an effective competitive position in the post war market. Whether this was the result of control of all respondents by a single parent, of superior wisdom common to sales executives of both groups, of refusal by one to be outdone in price competition by the other, or of the supposed pressure, which only suspicion and no evidence suggests was exerted by

one on the other; the result was not a restraint of competition, but the reverse. It was, therefore, not a violation of the statutory prohibition of "restraint of trade" or commerce.

III. Prejudicial Errors Committed by the Trial Court Require Reversal of Its Judgment, Regardless of the Disposition of the Questions Presented in the Petition for Certiorari.

A. The trial court erred, to the serious prejudice of respondents, in refusing to withdraw from the jury the charge of violation of Section 7 of the Clayton Act.

The complaint charged that the transfer, by Distillers Corporation Seagram, Ltd., of the stock of its wholly owned Calvert subsidiary, to another wholly owned subsidiary, Joseph E. Seagram & Sons, Inc., had lessened competition between the Calvert and Seagram groups in violation of section 7 of the Clayton Act (R. 9), and that this allegedly unlawful stock acquisition had been a means of effectuating an alleged combination in violation of Section 1 of the Sherman Act. (R. 11-12, 14.) Damages were asserted to have resulted, not only from the alleged Section 1 violation, but from "said unlawful acquisition" of stock. (R. 16.)

Essential to establish the Clayton Act violation was evidence that the stock acquisition had "lessened competition" between Seagram and Calvert. *International Shoe Co. v. Federal Trade Commission* (1930), 280 U. S. 291. Not only was such evidence wholly absent, but also it affirmatively appeared that operative control and management of the companies was unchanged. (R. 151-152.) The claim of Clayton Act violation was wholly abandoned. (R. 401.)

Respondents duly requested an instruction withdrawing this issue from the jury. (Defendants' request No. 3, R. 354.) Exception to its refusal was taken. (R. 269.)

This refusal was error.

Wilmington Star Mining Co. v. Fulton (1907), 205
U. S. 60, 78.

Jarrett v. Ellis (1923), 193 Ind. 687, 692.

The error was extremely prejudicial to respondents. No less than six times during the reception of evidence the trial judge took occasion to emphasize the importance and effect of this stock acquisition. (R. 209, 210, 227, 233 (twice), 234.) In the charge given he directed specific attention to the claim that by the stock acquisition Seagram had "gained control of its principal competitor." (R. 262.) The charge defined conspiracy in one aspect as an agreement to attain a lawful object by unlawful means. (R. 266.) The jury were authorized to find for plaintiff and assess damages upon finding the conspiracy "as alleged" (R. 266-267) or "charged in the complaint." (R. 267.) Thus the jury were in effect authorized to find for the plaintiff because of the allegedly unlawful acquisition of the Calvert stock. Probability that one or more did just this is enhanced by the repeated and sinister emphasis placed upon this allegation by the trial judge. Failure to withdraw this issue upon request was therefore highly prejudicial error.

B. The trial court erred in instructing the jury that "it is no defense to this action, even though the plaintiff and the other wholesalers entered into a conspiracy among themselves." (R. 264.) Exception taken. (R. 269.)

The existence of the Indiana wholesalers' conspiracy had been pleaded as a defense (R. 23-25) and had been assigned by Fischel (R. 204) and Wachtel (R. 228) as reason for stopping Indiana shipments.

Ample evidence to warrant the jury in finding that such a conspiracy existed had been introduced. Circumstantially, Maxley's announcement of petitioner's proposed

mark-up at the October 31 wholesalers' meeting (R. 48) followed by the substantially simultaneous and immediate adoption of this identical price change by all others (R. 299-322) was alone sufficient. *Interstate Circuit v. United States* (1939), 306 U. S. 208, 226. Moreover, Lutz admitted to Bernbach that the identical pricing was the result of action taken at the October 31 meeting. (R. 194.) The trial court erroneously excluded similar declarations of other co-conspirators. (R. 191, 195.)

There was thus ample evidence that Indiana wholesalers were proposing to market respondents' products in violation of Section 1 of the Sherman Act and the anti-trust law of Indiana.

The existence of the wholesalers' conspiracy *did* constitute a good defense, and the court erred in denying it on at least three grounds.

(1) Wholly apart from the risk of becoming *particeps criminis*, respondents' collection of the price of merchandise furnished to be resold in violation of law would have been jeopardized.

Hanauer v. Doane (1870), 12 Wall. 342.

Graves v. Johnson (1892), 156 Mass. 211, 30 N. E. 818.

(2) Respondents justifiably withheld previously contracted shipments of goods to be resold in violation of law.

Church v. Proctor (C. C. A. 1, 1895), 66 Fed. 240.

Foley Mfg. Co. v. Sierra Nevada Lumber Co. (C. C. A. 7, 1909), 172 Fed. 197.

Justifiable refusal to assist the fruition of an illegal conspiracy could not be "restraint of trade" even if respondents *combined* so to refuse.

(3) The "trade" protected by the Sherman Act is lawful "trade"; the damages to business to be awarded un-

der the Clayton Act, sec. 4 are damages to legal, not illegal business, and petitioner was not entitled to an award of damages resulting from deprivation of merchandise and loss of profits from resale of merchandise which petitioner proposed to resell in violation of the laws of both state and nation.

Maltz v. Sax (C. C. A. 7, 1943), 134 Fed. 2d 2, 5.

Moore v. Mead Service Co. (C. A. 10, 1950), 184 F. 2d 338, 340.

C. The trial court committed numerous prejudicial errors in the admission of evidence.

(1) The court erred in admitting over respondent's objection the answers to various interrogatories designed to disclose the wealth and size of respondent corporations, having no relevancy to any issue to be tried, and calculated to prejudice the jury with respect to both substantive issues and damages.

Answers to these interrogatories (Calvert Sales, 8, 9, 10, R. 377, 378; Calvert, 24, R. 384; Seagram Ind., 31, 32, R. 388, and Seagram, Sales, 7, R. 391) were admitted over objection (R. 144, 146, 148), and had no conceivable relevance except to establish the wealth and financial importance of respondents.

Actual damages only were recoverable (*Keough v. C. & N. W. Ry. Co.* (1922), 260 U. S. 156, 164) and punitive damages were not to be assessed. *Hansen Packing Co. v. Armour & Co.* (D. C. N. Y. 1936), 16 F. Supp. 784, 788. It was therefore prejudicial error to admit evidence relevant only to respondents' ability to pay damages.

Washington Gas Light Co. v. Lonsden (1899), 172 U. S. 534, 554, 555.

(2) The trial court erred in permitting the witness Barden to give a hypothetical calculation of petitioner's losses by reason of the deprivation of the Seagram and Calvert merchandise, based upon audit of petitioner's books, and Alcoholic Beverage Commission records, when neither the books or records were produced for examination. (R. 119, 120, 121, 122, 123.)

Cabel v. U. S. (C. C. A. 1, 1940), 113 F. (2d) 998, 1001.

Pabst Brewing Co. v. E. Clemens Horst Co. (C. C. A. 9, 1916), 229 F. 913, 918.

Phillips v. U. S. (C. C. A. 9, 1912), 201 F. 259, 269.

Hagan Coal Mines, Inc. v. New State Coal Co. (C. C. A. 8, 1928), 30 F. (2d) 92.

(3) The trial court erred in permitting the witness Lutz to testify over objection that two-thirds of the petitioner's loss of profits was due to deprivation of Calvert and Seagram merchandise. (R. 139.)

Central Coal & Coke Co. v. Hartman (C. C. A. 8, 1901), 111 Fed. 96, 99-102.

U. S. v. Spaulding (1934), 293 U. S. 498, 506.

Farris v. Interstate Circuit (C. C. A. 5, 1941), 116 F. (2d) 409, 412.

Conclusion.

Respondents submit that the action taken by them, whether viewed as combined or separate, was not a "restraint of trade," and further that there was no evidence of unlawful conspiracy or combination. It is thus confidently expected that there will be no occasion for any court to consider the other errors of the trial court above listed,

which apart from all other questions required reversal of the judgment of the District Court.

Respectfully,

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No. 297

In the Supreme Court of the United States

OCTOBER TERM, 1960

KARLIS SEEVANT COMPANY, PETITIONER

JOSEPH E. SEAGRAM & SONS, INC., SEAGRAM-DISTILLERS CORPORATION, THE CALVERT LITHUING COMPANY AND CALVERT DISTILLERS CORPORATION

ON WRIT OF HABEAS CORPUS TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

AMICI CURIAE FOR THE UNITED STATES AS AMICUS CURIAE

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prices at which their Indiana wholesalers might resell their products and to withhold their products from any Indiana distributor who failed to observe the maximum resale prices fixed by the respondents.

The respondents are Joseph E. Seagram & Sons, Inc., referred to herein as Seagram; Seagram-Distillers Corporation, referred to herein as Seagram Sales; Calvert Distilling Company, referred to herein as Calvert; and Calvert Distillers Corporation, referred to herein as Calvert Sales. Calvert and Seagram Sales are wholly-owned subsidiaries of Seagram, and Calvert Sales is a wholly-owned subsidiary of Calvert. Seagram and Calvert manufacture liquor which they sell and distribute respectively; through Seagram Sales and Calvert Sales.

The jury returned a verdict for the plaintiff but, on appeal, the court below reversed. The grounds for reversal were, first, that the evidence failed to establish that the parallel action of the Seagram respondents and the Calvert respondents had been taken in concert or pursuant to conspiracy (R. 401-409) and, second, that the Sherman Act does not prohibit a conspiracy to fix *maximum* sale or resale prices (R. 409-412). The latter question, involving the scope of the application of the Sherman Act to price-fixing agreements, is obviously of grave concern to the Government. But it also regards the ruling by the court below on the sufficiency of the evidence as presenting an important

issue as to the respective functions of court and jury in passing upon the ultimate fact of conspiracy in the light of the entire body of evidence, particularly where, as here, the evidence relied upon to establish conspiracy is largely circumstantial and consists, in part, of parallel action by the defendants. The Government in its own suits under the Act is not infrequently faced with adverse determinations of this issue. See *Pevely Dairy Co. v. United States*, 178 F.2d 363 (C.A. 8), certiorari denied, 339 U. S. 942.

The Government is therefore presenting its views on the two issues brought before the Court by grant of certiorari. While the sufficiency of the evidence is of interest to the Government only in relation to the general question of invasion of the jury's fact-finding province in cases under the Sherman Act, we believe that our discussion of this question will be more helpful if we deal not merely with general rules of law which are universally acknowledged, but with the specific evidence which may be thought to support the jury's finding of conspiracy.

I

Conspiracies to Fix Maximum Resale Prices Are Per Se in Violation of the Sherman Act

In *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 218, decided in 1940, this Court pointed out that it had for over forty years "consistently and without deviation adhered to the principle that price-fixing agreements are unlawful *per se*

under the Sherman Act." The Court rejected the contention that the Act outlaws only agreements upon specific price. It said (p. 221) that any combination which "tampers with price structures" is engaged in an illegal activity, that the members of a price-fixing group, to the extent that they "raised, *lowered*, or stabilized prices" would be "directly interfering with the free play of market forces," and that the Act "protects that vital part of our economy against any degree of interference." [Italics supplied.]

The interpretation thus placed upon the Act was not casual or inadvertent, but was inherent to the concept of unlawful price fixing on which decision of the case was rested. The view that it was unlawful to agree upon either a floor or a ceiling for prices was twice reiterated. The Court said (p. 222) that "agreements to raise or *lower* prices" are illegal under the Act, and that prices are fixed within its meaning "if the range within which purchases or sales will be made is agreed upon, if the prices paid or charged are to be at a certain level or on ascending or descending scales, if they are to be uniform, or if by various formulae they are related to the market prices." [Italics supplied.] Again, the Court said (p. 223) that a combination formed for the purpose and with the effect of "raising, *depressing*, fixing, pegging, or stabilizing the price of a commodity" is illegal *per se* under the Act. [Italics supplied.]

The court below was of the opinion that the agreement to fix maximum resale prices, charged against respondents, was not a price-fixing agreement since the wholesaler was free to sell at any price he saw fit "within the maximum limitation" (R. 410). But an agreement upon either the upper limit of price or its lower limit constitutes control over price through combination. There is agreement upon price notwithstanding the fact that, in the one case, the parties are free to sell at less than the prescribed maximum and, in the other case, at more than the prescribed minimum.

The view of the court below was that an agreement on maximum prices is "neither in restraint of trade nor an impairment of competition" (R. 410). Competition, the court said, consists in the ability to meet or undersell the price fixed by a competitor, and the consumer is benefited and trade is stimulated by the lower prices which result from such competition. The court further concluded that an agreement upon maximum price does not thwart these objectives and is therefore not to be regarded as within the Act's prohibitions.

The purpose of the Sherman Act is to keep trade free from artificial restraints and limitations imposed by combination. In the price field, this means that prices shall find their own level upon the basis of the independent action of both buyers and sellers. Low prices are not, as such, an objective of the statute. This seems apparent if consid-

eration is given to a combination among buyers to depress the price at which they purchase. The Act is designed to permit sellers to dispose of their goods in a market free from combination among buyers to keep prices low, just as it is also designed to permit buyers to purchase in a market free from combination among sellers to enhance or maintain prices.

Swift & Co. v. United States, 196 U. S. 375, 391, upheld the validity of a complaint which charged, among other things, that the leading meat packers had conspired to refrain from bidding against each other in the purchase of livestock at public stockyards, thereby compelling the owners of stock to sell at lower prices than they would have received if the bidding had been competitive. Similarly, in *American Tobacco Co. v. United States*, 147 F. 2d 93 (C.A. 6) the evidence submitted to the jury in support of the charge of illegal restraint and monopolization of trade consisted, in part, of proof that the leading cigarette manufacturers, in purchasing leaf tobacco at public warehouses, had used tactics similar to those charged in the *Swift* case. In the words of the court (p. 101), the Government charged the defendants with maintaining "price ceilings which, as a result of agreement between them, none exceeds," and this charge was supported by evidence that each of the Big Three gave its buyers instructions as to the prices to be paid for the leaf tobacco to be pur-

chased on each of the various markets, which instructions were "in terms of top prices."¹

An agreement among a group of sellers dominant in their industry, to fix maximum resale prices for their products, provides a ready instrumentality for maintaining the sellers' own prices while securing the benefit of relatively low resale prices, by squeezing the distributor's margin, i.e., the spread between the distributor's purchase price and his resale price. The agreement upon maximum resale prices charged against the present respondents clearly was of this character. A similar use of power to depress resale price was shown in the *American Tobacco Co. case, supra*. There was evidence in that case that certain of the defendants had insisted that their retailers permit no more than a three-cent differential between the retail price of their cigarettes and that of the so-called 10-cent brands and that the retailer should therefore either reduce his price on defendants' cigarettes from 14 cents to 13 cents a pack or raise his price on the 10-cent brands from 10 cents to 11 cents. 147 F. 2d 93, at pp. 105-106.

A decision sanctioning agreements to fix maximum resale price would permit manufacturers to exercise price control over their products after they had passed into the channels of distribution. Trade in food products might, through this means,

¹ The decision upholding conviction of the defendants was affirmed in 328 U. S. 781 after review limited to questions other than that referred to above.

be confined to supermarkets operating on the basis of large sales volume and low profit margin. Smaller outlets providing additional service or meeting special needs, whether by extending credit to customers, by keeping open long hours, by making deliveries, or by being located close to a small consuming group, could not profitably handle goods on which a maximum resale price, narrowly above purchase price, had been fixed.

We submit that the interpretation placed upon the Act in the *Socony-Vacuum* case is correct and should be reaffirmed.

II

There is Adequate Evidentiary Support for the Jury's Finding of Conspiracy

We shall undertake to marshal, with only minor comment, evidence upon which the jury might have relied in concluding that the respondents conspired with each other to withhold their products from petitioner unless it would yield to their dictates as to maximum resale price.

In 1946 petitioner was one of the leading wholesalers of liquor in Indiana (R. 36) and it had been a distributor of Seagram whiskies continuously since the repeal of prohibition in 1933 (R. 283). On November 1, 1946, petitioner notified the Indiana Alcoholic Beverage Commission of a new price scale which the Commission approved (R. 308). It was higher than that permitted by OPA regulations, which terminated on October 23, 1946 (R.

42-44). On November 6, 1946, Seagram sent a telegram to all of its Indiana wholesalers requesting immediate assurance that they would continue the OPA maximum prices (R. 392-393). To enforce this policy, it cut off all shipments to Indiana wholesalers who failed to continue OPA maximum prices (R. 204).

In the spring of 1942 representatives of Calvert Sales advised petitioner's president that their distribution in Indiana was "wholly unsatisfactory" and that they would like to obtain petitioner as an Indiana distributor (R. 36). Petitioner suggested that the matter be deferred until there was a sufficient supply of Calvert whiskies to make the arrangement worthwhile (R. 36-37, 79, 107).² The subject was again taken up in the latter part of October 1946 when petitioner said that it would be glad to become a Calvert distributor provided it could be assured that it would receive from 2,000 to 3,000 cases a month, with deliveries rising to 4,000 cases a month as rapidly as possible. (R. 37-38, 108).

At meetings with officers of petitioner on November 5 and November 11, 1946, these assurances were given and it was agreed that the petitioner would become a distributor of Calvert whiskies (R. 80-81, 108-109). Petitioner was told that its price change on November 1, 1946, would have no

² During the war, distillers had to conserve their stocks because, under orders of the federal Government, only a limited production of whiskey from grain was permitted (R. 282).

effect whatsoever on the shipment of whiskey to it as a Calvert distributor and that Calvert was going through with the distributorship arrangement regardless of what Seagram did in Indiana (R. 81, 108).

At the conference on November 11th plans were made for a sales promotion meeting to be held on November 23d in order "to start off with a big bang" (R. 81). This meeting was to take the form of a hotel luncheon attended by all of petitioner's salesmen and nine of Calvert's New York executives (R. 81-82, 109). Arrangements were made for hotel reservations for Calvert's officers and for a banquet room to accommodate 60 people (R. 82). Calvert Sales also advised petitioner that it had been given an initial allocation of 2,000 cases of whiskey for November and a further allocation of 2,000 cases for December, and on November 13, 1946, petitioner sent Calvert Sales Indiana revenue stamps covering these allocations. (R. 284-285).

On November 19, 1946, the Chicago sales manager of Calvert Sales notified petitioner's president by telephone that the arrangement for it to act as a Calvert distributor was at an end and, in explanation of the change in policy, said that "we have to go along with Seagram". (R. 39, 40). Petitioner's president immediately telephoned Calvert Sales' general sales manager, who said that it "had

to go along with the other side of the house," by which he meant Seagram (R. 41).

Calvert and Calvert Sales each answered, in the affirmative an interrogatory inquiring whether between November 6, 1946, and February 3, 1947, officers of the Seagram respondents had communicated or conferred with it "with reference to the delivery or nondelivery of Calvert products" to petitioner (R. 379, 383). In response to a further interrogatory, each replied that it was "unable to give any specific dates of any such conferences or communications" (*ibid.*).

• The evidence to which we have referred would seem to furnish adequate support for a finding by the jury that the Seagram and Calvert respondents had acted in concert and pursuant to agreement in refusing to deal with petitioner, in order to induce it to adopt specified maximum resale prices. The jury might have concluded that such conspiracy was entered into some time between November 11, 1946, and November 19, 1946, the latter being the date on which Calvert Sales precipitately repudiated the distributorship which, so shortly before, it had sought and made plans to foster and exploit. The jury may have believed the testimony that the only explanation given for the about-face of Calvert Sales was that it was required to act in unison with Seagram, which had stock control of Calvert. And the jury may have failed to give credence to

the testimony of respondents' officers that communications and conferences between Seagram officers and those of Calvert Sales on the subject of withholding Calvert products from the petitioner followed, rather than preceded, Calvert Sales' sudden reversal of policy.

Both private litigants in treble-damage actions and the Government in its own actions under the Sherman Act generally find it difficult to adduce direct proof of conspiracy. Agreements to restrain trade are seldom reduced to writing, and proof in such cases frequently rests on circumstantial evidence which the defendants attempt to rebut by oral testimony. It then becomes the function of the jury to weigh the credibility of the defendants' testimony against the permissible inferences to be drawn from their conduct. In the instant case, the conclusion of the jury that the defendants had participated in the conspiracy charged presumably was based not only upon circumstantial evidence but upon direct testimony indicating that Calvert's refusal to act as a supplier of petitioner was occasioned by what Calvert deemed to be the necessity of acting in concert with Seagram. Under such circumstances, for an appellate court which did not hear the evidence or see the witnesses to decide, as a matter of law, that the evidence was insufficient to sustain the verdict, is a clear-cut usurpation of the function of the jury—a

function which this Court has been at pains to preserve.³

Respectfully submitted.

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NOVEMBER 1950.

³ See *United States v. Knight*, 336 U. S. 505; *Bozza v. United States*, 330 U. S. 160; *United States v. Bruno*, 329 U. S. 207; *Burton v. United States*, 202 U. S. 344; *Crumpton v. United States*, 138 U. S. 361; *Ellis v. Union Pacific R. Co.*, 329 U. S. 649; *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29. But compare *Pevely Dairy Co. v. United States*, 178 F. 2d 363 (C.A. 8), certiorari denied, 339 U. S. 942.

PETITION

FOR

RE-HEAR.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1950.

No. 297

KIEFER-STEWART COMPANY,

Petitioner,

vs.

**JOSEPH E. SEAGRAM & SONS, INC., SEAGRAM-
DISTILLERS CORPORATION, THE CALVERT DIS-
TILLING COMPANY AND CALVERT DISTILLERS
CORPORATION,**

Respondents.

PETITION FOR REHEARING.

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Respondents.

PETITION FOR REHEARING.

Respondents respectfully petition the Court to grant rehearing of the above cause, modify the opinion and mandate heretofore rendered and reverse the judgment of the District Court and order a new trial of said cause for the reasons following:

I.

It is respectfully suggested that this Court has overlooked the significance and effect under the prevailing Indiana practice, of the trial court's failure to instruct the jury that the acquisition of the Calvert stock was not illegal; and that this failure amounted in effect to a direct invitation to the jury to find for plaintiff merely because

Seagram had acquired the Calvert stock, and Calvert had thereby been caused to "go along with Seagram," and this error of the trial court requires a new trial and not affirmance.

In Indiana *the complaint is taken to the jury room, and a charge based upon proof of "facts alleged in the complaint" insufficient in law to authorize recovery (without specification of the controlling facts) is error.*

Terre Haute, Indianapolis & Eastern Traction Company v. Scott, 197 Ind. 587, 598; 150 N. E. 777, 780-781.

The complaint *alleged* directly that the Seagram defendants sought to "maintain prices" and control Calvert dealings to that end by "the exercise over defendant Calvert and Calvert (Sales) of the influence unlawfully acquired by defendant Seagram (Indiana) by reason of the afore-said unlawful stock acquisition." (R. 11-12.) It was also alleged that subsequent to November 12, 1946, Seagrams did induce Calvert to enter into such conspiracy and was "able to induce defendants Calvert and Calvert (Sales) to enter into" such conspiracy "as a direct and proximate result of the unlawful acquisition" of Calvert stock. (R. 14.) Finally, it was alleged that plaintiff had suffered damages "as a proximate result of * * * of said unlawful acquisition * * * of defendant Calvert's common stock * * * and of the influence unlawfully exercised by Seagram (Indiana) over defendants Calvert and Calvert (Sales) as a result of such acquisition." (R. 16.) Thus the Sherman Act "conspiracy charged in the complaint" was at least in one aspect *alleged to have been accomplished by the acquisition of Calvert stock.*

The Court's charge defined "conspiracy" *as used in the Sherman Act* as "a confederation or agreement by and between two or more persons to accomplish by concerted

action, an unlawful or oppressive object, or a lawful object by *unlawful or oppressive means*" (our italics) and informed the jury that "The first question, therefore, for you to determine is whether or not a contract or conspiracy did exist as alleged in the complaint, by and between the defendants". (R. 266.) He also charged: "If, therefore, you find from a preponderance of the evidence that such a contract or conspiracy was entered into by the defendants for the purpose of fixing the resale prices of their products, then you shall find that such contract was illegal within the meaning of this statute, and it will not be necessary for you to go any further into the reasons why it was illegal. * * * if you find that a *conspiracy as charged in the complaint* was entered into, then your duty is very simple in determining that there was such a conspiracy and then you pass on to the damages, if any, which the plaintiff sustained." (R. 267-268, italics supplied.)

In the charge itself, the Court directed specific attention to the allegation that in 1945 Seagram acquired all the common stock of Calvert and thus gained control of its principal competitor and parenthetically admonished them to "keep that date in mind because it may become important." It is obvious that it could have had *no importance* unless in connection with the charge of Clayton Act violation. The Judge had also attempted to discredit Fischel's testimony that he did not control Calvert policies by allusion to the 100% stock control and had said flatly that "of course under those conditions Seagram would have a good deal to say about the policies." (R. 263.)

Consequently, when the Court refused to charge that the stock acquisition was not illegal, any reasonably alert juryman might, *with the complaint before him*, well reason thus:

"Plaintiff claims that Seagram suppressed competition by acquiring Calvert stock, and the Judge has

indicated that this gave Seagram control of Calvert and is important. The law says that a restraint is illegal and the Judge defined an illegal conspiracy as use of unlawful means to accomplish a lawful object. Even if Wachtel and Fischel told the truth, Seagram illegally suppressed competition and restrained trade by acquiring this stock, otherwise, why did the Judge stress its importance and jump on to Fischel about it? Therefore I believe that defendants are in an illegal conspiracy."

We submit that not only has this Court fallen into inadvertent error in stating that "a formal withdrawal of this issue would have served only to confuse," but that when failure to withdraw it is viewed in the light of the complaint, the remarks of the judge during the trial, and the emphasis placed upon it, both directly and indirectly, by the instructions given, serious and prejudicial error resulted.

Both under Federal and State practice, refusal to withdraw an issue or count upon which there is *no* evidence, is prejudicial error, unless it can definitely be determined that *no* prejudice resulted.

Wilmington Star Mining Co. v. Fulton (1907),
205 U. S. 60, 78.

Jarrett v. Ellis (1923), 193 Ind. 687, 692.

Here, we respectfully submit, the great balance of probability is that prejudice *did* result.

This probability is intensified by consideration of the nature of petitioner's evidence, which three experienced Judges thought wholly insufficient to sustain the verdict, the positive nature of respondents' testimony of no collusion, only circumstantially discredited; the fact that the jury required approximately 22 hours to reach a verdict (R. 273-279) and only did so after an almost mandatory

re-instruction (R. 276) which in the light of the Court's remarks and instructions concerning the stock acquisition could have meant to the jury but one thing, namely, to return a verdict for plaintiff.

We submit, therefore, that the verdict cannot stand, and that regardless of other errors, this alone would require a new trial.

II.

Respondents also strongly urge that errors in the admission of evidence relating to damages, duly assigned (Points 7, 9, 10, 11, 12, R. 362-364) but not passed upon by the Court of Appeals because of reversal on other grounds, and not directly adverted to by this Court, require a new trial.

These errors are:

(1) The erroneous admission of evidence relevant only to show respondents' wealth and size.

Over the objection of respondents, petitioner was permitted to read to the jury the answer to Calvert (Sales) interrogatory 8, showing dollar sales volume of this respondent to have ranged from over \$39,000,000 in 1938 to over \$140,000,000 in 1948 (R. 144, 377); Calvert (Sales) 10, showing Indiana sales ranging from less than \$1,000,000 in 1942 to over \$2,500,000 in 1948 (R. 144, 378); Calvert 24 and 25 showing the huge Calvert distilling and bottling capacity (R. 146, 389); Seagram (Indiana) 31 and 32 showing the huge Seagram producing and bottling capacity (R. 148, 388); and a portion of Seagram, Indiana, 25 showing total sales of \$314,098,381.41 in 1948. (R. 148, 391.)

The only possible relevance of any of these figures, with the possible exception of Calvert Indiana sales, was to show the size and extent of respondents' business and ability to respond in damages.

Since only *actual* damages were to be assessed by the jury, respondents' size, wealth and ability to respond were wholly irrelevant to any legal issue, and by the same token the admission of the evidence was highly prejudicial.

Washington Gas Light Co. v. Lansden (1899), 172 U. S. 534, 554-55.

(2) The erroneous admission of accountant's calculation made from petitioner's books, and Alcoholic Beverage Commission records, without production of such books and records.

This witness testified that, having for several years been an auditor familiar with petitioner's books, he had "made a study and analysis of the figures and *facts* in order to make an estimate of the loss and (of) profits resulting to Kiefer-Stewart during the years 1947, 1948 and the first three months of 1949 *because of its not having the Seagram and the Calvert line of whiskies to sell to its customers*". (Our italics.) (R. 119.)

He was then permitted, over objection that the question "calls for a hearsay conclusion, based upon books whose authenticity has not been established and whose method of accounting has not been "established", that the loss was \$679,378. (R. 121.) He was then permitted, over renewed objection, to detail total sales for 1946, \$10,931,300; 1947, \$3,992,358; 1949 (3 mos.), \$703,975; the same three months of 1946, \$2,239,335; the percentage loss for 1947 over 1946, 36.52 per cent; 1948, 28.52 per cent. (R. 121-122.)

Over like objection (R. 126) the witness was allowed to repeat the same figures as to sales, and to attest total loss or falling off of sales of \$16,287,879. (R. 126.) Still over objection, he was permitted to testify that profits would have been 61 per cent on this volume or a total of \$1,050,000; and that the lower figure of \$679,378 was calculated upon a basis "which recognizes a general decline in the State in the liquor business". (R. 128.) So far as appears, the

"general decline in the State" had been ascertained from "examination of certain of the record of the Indiana Alcoholic Beverage Commission" (R. 122), apparently stamp sales. (R. 123.)

Hence, it clearly appears that this witness was permitted to testify to a plausibly detailed and speciously intricate guess as to what "might have been", based entirely upon records never produced, never authenticated and never seen by court, jury or petitioners.

Whether the witness had accurately abstracted the records, whether the method of cost accounting used was sound or otherwise, whether the "assumptions" made had been accurately applied to the figures, whether the Alcoholic Beverage Commission stamp sales accurately represented actual wholesale liquor sales for the period in question; in short, whether the projection had any more validity than an astrological horoscope, could not possibly be ascertained without production of the books and records. We submit that this ruling was prejudicial error.

Cabel v. United States (1940), 113 F. (2d) 998, is quite illustrative. In that case a witness for petitioner plaintiff was permitted to detail results of an analysis of respondents' own books, without producing them. Having analyzed certain cases cited to justify this, the court said:

"The above and similar cases have been cited to us by counsel for the plaintiff, but in no case that has come to our attention does it appear that such testimony has been admitted unless the books or documents which are the basis of the testimony of the expert witness have been produced in court and made available for purposes of cross-examination. We can see no reason for any further relaxation of the rule as to the best evidence than as stated above, and it seems to be well settled that, at least, the production in court of the books or records which have been the subject of the examination by the expert witness is a prerequisite to the admission of his testimony construing them."

Similar rulings in other circuits are:

Pabst Brewing Co. v. E. Clemens Horst Co. (C. C. A. 9, 1916), 229 F. 913, 918.

Phillips v. U. S. (C. C. A. 9, 1912), 201 F. 259, 269.

Hagan Coal Mines, Inc. v. New State Coal Co. (C. C. A. 8, 1928), 30 F. (2d) 92.

The above inadmissible evidence was the sole basis for any award of damages. We believe that its admission requires a new trial.

III.

In affirming the correctness of the trial court's instruction that petitioner's participation in the conspiracy of Indiana wholesalers constituted no defense to this action, this Court has wholly ignored the fact that all damages alleged or proved consisted of profits lost in resale of merchandise, which profits, at least so long as petitioner was participant therein, were the profits of an illegal conspiracy; and has thereby placed business condemned by Section 1 of the Sherman Act within the protection of Section 4.

However correct the decision that the illegal conduct of petitioner could not legalize unlawful combination of respondents, we respectfully suggest that the Court has fallen into grave error in stating that it could not "immunize them against liability to those they injured."

For the latter proposition are cited only *Fashion Originators' Guild v. Trade Comm'n* (1941), 312 U. S. 457, and *Mandeville Island Farms v. American Crystal Sugar Co.* (1948), 334 U. S. 219, 242-243.

The first case supports the proposition that the United States may suppress an illegal combination, although it is directed at illegal practices of competitors, but does not hold that the competitors could have recovered threefold

damages consequent upon the effect of the combination upon the profits of their own illegal enterprise. This distinction is alluded to by Murrah, J., in *Moore v. Mead Service Co.* (C. A. 10, 1950), 184 F. 2d 338, 341.

In the *Mandeville Farms* case, producer-sellers of sugar beets were allowed damages based upon reduced prices consequent upon an illegal price fixing combination engaged in by the buyer to whom their beets had been sold. While the fact that the plaintiff had sold to a member of the combination had been urged as making it *particeps criminis*, and had been so adjudged in the trial court (*Mandeville Island Farms Inc. v. American Crystal Sugar Co.* (D. C. Cal. 1946), 64 F. Supp. 265, 267), neither this Court nor the Court of Appeals (159 F. 2d 71) alluded to it. Since plaintiff had no market for beets, except a member of the combination, the fact that plaintiff sold to a member at the illegally depressed price could scarcely have made plaintiff a participant in the conspiracy.

In the instant case, however, Kiefer-Stewart's alleged damage resulted from respondents' refusal to supply merchandise to be resold in violation of law (i. e., at prices fixed by illegal combination) and the opinion of this Court awards petitioner as damages the lost profits of an illegal enterprise. Petitioner's only damage was alleged to have resulted from deprivation of merchandise to be resold (R. 16), and the proof of damage offered was an estimate of profits lost by reason of diminished sales (R. 121-128, 139). The profits allegedly lost were not the profits of plaintiff's legitimate drug business, but profits lost by lost sales of liquors at prices which for an indefinite period were prices fixed and established by illegal combination with petitioner's competitors. Whatever respondents' guilt, however tortious their conduct, it is, we submit, contrary to every principle of our law that a plaintiff should be awarded dam-

ages resulting solely from diminution of the profits of an illegal enterprise.

Damages from breach of a warranty of the speed of a truck may not be predicated upon profits lost, where earning the lost profits at the warranted speed would have resulted in a law violation.

Shelley v. Hart (Ct. of App. Cal. 1931), 112 Cal. App. 231, 242, 297 Pac. 82, 87.

A tavernkeeper may not include in the lost profits due to his landlord's breach of covenant the profits lost from the prevention of illegal Sunday operations.

Raynor v. Blatz Brewing Co. (1898), 100 Wis. 414, 420, 76 N. W. 343, 345.

Deprivation of the services of employees engaged in unlawful liquor sales and loss of wages paid them are not recoverable as damages for wrongful levy.

Young v. Stevenson (1905), 75 Ark. 181, 184, 86 S. W. 1000, 1001.

Lost profits from operation of a gambling house are not recoverable as damages for wrongful levy and seizure of its equipment.

Kauffman v. Babcock (1887), 67 Tex. 241, 244, 2 S. W. 878, 879.

To hold that respondents might not legally *combine* to refuse merchandise to the conspiring Indiana wholesalers is one thing. To hold that the participants in this illegal conspiracy may recover the profits lost by reason of respondents' refusal to furnish merchandise for illegal resale is quite another. If grocers *combine* to refuse sugar to illicit distillers; if printers *combine* to deny lottery tickets to lotteries; if beer distributors *combine* to with-

hold supplies from "blind pigs", are the lost profits of these illegal enterprises to be protected and restored in an action for damages? Are the profits of a business being conducted in violation of Section 1 of the Sherman Act within the protection of Section 4? Two Federal Courts of Appeals have said no.

Maltz v. Sax (C. C. A. 7, 1943), 134 Fed. 2d 2, 5.

Moore v. Mead Service Co. (C. A. 10, 1950), 184 F. 2d 338, 340, and opinion of Murrah, Circuit Judge, specially concurring, p. 341.

Respondent introduced (R. 48, 194; 299-322) and offered (R. 191, 195) evidence well nigh conclusive to show that at the time respondents ceased shipments to petitioner, petitioner and other Indiana wholesalers were engaged in marketing liquor at prices unlawfully fixed by an unlawful conspiracy such as that condemned by this Court in *U. S. v. Frankfort Distilleries* (1945), 334 U. S. 495. The lost profits which have been awarded petitioner unquestionably include profits lost by reason of not having had respondents' merchandise to sell at these illegal prices. We submit, therefore, that in instructing the jury wholly to disregard evidence of petitioner's participation in this illegal conspiracy the trial court committed seriously prejudicial error.

Respectfully submitted,

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CERTIFICATE OF COUNSEL.

The foregoing Petition for Rehearing is believed to be meritorious and is presented in good faith and not for delay.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1950.

No. 297.

KIEFER-STEWART COMPANY, *Petitioner,*

v.

JOSEPH E. SEAGRAM & SONS, INC., SEAGRAM DISTILLERS CORPORATION, THE CALVERT DISTILLING COMPANY and CALVERT DISTILLERS CORPORATION, *Respondents.*

RESPONSE TO PETITION FOR REHEARING.

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RESPONSE TO PETITION FOR REHEARING.

In answering the petition for rehearing, we will limit ourselves to showing, for the convenience of the Court, that all of the three points relied upon by respondents were fully presented both on the original briefs and oral argument and have been held by unanimous decision of this Court to be without merit. We will deal with these points seriatim as they appear in the respondents' petition for rehearing.

I.

The trial court affirmatively instructed the jury that in order to find for the plaintiff they must find a conspiracy

to fix prices and, negatively, that in the absence of such a conspiracy to fix prices the jury must find for the defendant. Point I of the respondents' petition is a claim that the Court should have added a statement "that the acquisition of the Calvert stock was *not illegal*" in order to avoid possible confusion. Respondents made the identical point on pages 31 and 32 of their original brief, and argued it orally. (See pages 50 and 51 of the transcript of oral argument.)

II.

Point II consists of two arguments. The first is the claim that certain evidence showing respondents' productive capacity and sales was inadmissible. The admissibility of this evidence (clearly relevant to the coercive power of the restraint imposed by respondents and also to damages) was argued by the respondents in their original brief, page 34, and answered in petitioner's main brief, page 43.

The second claim under Point II is an alleged error in the admission of expert accounting evidence based on petitioner's books.* The same contention was urged in respondents' brief, page 35. It was answered in petitioner's brief, pages 42-43, by showing (1) that the testimony was admissible under Indiana decisions and federal rules and (2) that when the court made inquiry whether the respondents insisted on the production of the original books respondents did not insist but instead gave only equivocal answers.

III.

Point III consists of the claim that the "lost profits which have been awarded petitioner unquestionably include profits lost by reason of not having had respondents' merchandise to sell at . . . illegal prices." (Pet. for Rehearing, p. 11.) This argument was made on pages 33 and 34 of

* The trial court barred any use by petitioner of the stamp records of the Indiana Alcoholic Beverage Commission (R. 124).

respondents' original brief under heading (3). The evidence does not permit such a conclusion, and in response to a question by Mr. Justice Black, respondents admitted that they had not pressed the "detail" of any showing with respect to damages which^s would have substantiated this contention. (Transcript of oral argument, p. 54.)

CONCLUSION.

It is therefore respectfully urged, since all issues presented by the petition for rehearing have already been fully argued and disposed of, that such petition be denied.

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